

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 SECURITIES AND EXCHANGE
4 COMMISSION,

Plaintiff,

v.

23 Civ. 4738 (KPF)

6 COINBASE, INC. AND COINBASE
7 GLOBAL, INC.,

Oral Argument

8 Defendants.

9 -----x

10 New York, N.Y.
11 January 17, 2024
12 10:00 a.m.

Before:

13 HON. KATHERINE POLK FAILLA,

14 District Judge

15 APPEARANCES

16 U.S. SECURITIES AND EXCHANGE COMMISSION
Attorneys for Plaintiff

17 BY: PETER MANCUSO
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21 BY: WILLIAM D. SAVITT
22 SARAH K. EDDY
KEVIN S. SCHWARTZ
-and-
23 SULLIVAN & CROMWELL, LLP
BY: STEVEN R. PEIKIN

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1 (Case called)

2 MR. TENREIRO: Jorge Tenreiro for the Securities and
3 Exchange Commission, your Honor.

4 MR. COSTELLO: Good morning, your Honor, Patrick
5 Costello, also on behalf of the Securities and Exchange
6 Commission.

7 MR. MARGIDA: Good morning, your Honor, Nick Margida
8 on behalf of the SEC.

9 MR. MANCUSO: Peter Mancuso on behalf of the SEC. Good
10 morning, your Honor.

11 THE COURT: All right. Good morning. It's
12 interesting. You already anticipated and issue I have, which
13 is I prefer that people stand. But if I can't hear you, I'm
14 going to have to let you sit. I'll let it be determined by
15 whether our court reporter can hear you or not.

16 My friends at the back table, if you would like to
17 introduce yourselves?

18 MR. SAVITT: Good morning, your Honor William Savitt,
19 Coinbase and Coinbase Global.

20 MS. EDDY: Good morning, your Honor. Sarah Eddy for
21 Coinbase and Coinbase Global.

22 MR. SCHWARTZ: Good morning, your Honor. Kevin
23 Schwartz for Coinbase and Coinbase Global.

24 MR. PEIKEN: Steven Peiken for the same.

25 THE COURT: Good morning. We have a lot to cover this

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1 morning. I understand as well that there are number of people
2 listening in on the phone. I'm going to remind you for the
3 sake of my deputy to not unmute yourselves during this
4 conference because we will hear you, and it will disrupt us. I
5 usually tell people preliminary to oral argument to please
6 answer the questions that I've asked and to not read too much
7 into the questions that I've asked. And I think I'm going to
8 say that here as well.

9 Another thought that I had was that typically I'll let
10 folks give me something in the vein of an opening statement,
11 and then I'll start asking questions. But I think I'd rather
12 do something a little bit different this time, and that is, I
13 have read all the briefs. I have read all the amicus briefs.
14 I've read the majority of the cases that are cited in the
15 briefs, and so if we're going to be summarizing arguments, I
16 don't think I need that. I do have questions for both sides.
17 So I think what I'd prefer to do is simply to ask my questions
18 of each side, one side and then the other, not going back and
19 forth as between the *Howey* test and major questions doctrine
20 and things of that nature. And then at the end, if there's
21 something I haven't asked you and you believe it's necessary to
22 my decision, you can please let me know. We'll see how that
23 works.

24 For my friends at the front table, is there a division
25 of labor among the issues?

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1 MR. COSTELLO: Yes, your Honor. I'll be planning to
2 address any questions the Court has concerning *Howey*, and then
3 my colleague Mr. Tenreiro will address the major questions
4 doctrine, and my colleague Mr. Margida will address the wallet
5 claim and the staking.

6 THE COURT: I want to hear that again. So you are
7 *Howey*. Mr. Tenreiro is major questions. Who else is speaking,
8 sir?

9 MR. COSTELLO: My colleague Mr. Margida will address
10 that.

11 THE COURT: Yes, is speaking about staking and the
12 wallet?

13 MR. MARGIDA: Yes, that's right.

14 THE COURT: My friends at the back table, is there a
15 division of labor?

16 MR. SAVITT: Yes, your Honor. I'll be doing my best
17 to handle questions regarding the investment contract matter
18 and the cases involving *Howey* and others. Ms. Eddy is going to
19 take the lead on major questions doctrine. Mr. Schwartz is
20 going to address wallet and staking. Mr. Peiken is going to
21 correct all of our errors.

22 THE COURT: Okay. Let's hope there are few.
23 Although, I, of course, enjoy hearing from him.

24 All right. Mr. Costello, let me then please begin
25 with you, sir. At the last conference we had in this case, one

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1 of the early questions I had addressed the degree to which I
2 could take judicial notice of what ends up being the first 33
3 pages of Coinbase's answer. It is, of course, footnoted.
4 There are sources to it. What is the commission's view as to
5 the degree to which I may take judicial notice of the facts
6 that are contained in that section?

7 MR. COSTELLO: Your Honor, I believe that the bulk of
8 the information that you see in those first 33 pages, in I
9 think 105, 106, something like that, footnotes. The
10 information in there is not integral to the pleadings, which is
11 the standard, I believe, that the Court would be following in
12 this instance. On a 12(C), the Court would be required to
13 accept the allegations in the SEC's complaint as true and would
14 be required to draw all reasonable inferences from those
15 allegations in the SEC's favor, as well as other documents and
16 materials that are contained in the complaint from which we
17 reference. All of that the Court can consider, but I don't
18 believe that the same is true for the bulk of the material that
19 you see in those first 30 pages. They are just not integral to
20 the SEC's complaint.

21 THE COURT: There is a substantial portion of
22 Coinbase's briefing and Coinbase's answer, I guess I'll speak
23 to more specifically that from my perspective is interesting
24 and as a matter of optics but might not actually be
25 determinative. Just to further probe your answer, if I

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1 exclude -- and Coinbase will tell me why I shouldn't -- the
2 references to, for example, their efforts to either provide
3 information to the commission or to obtain clarity from the
4 commission, are you still suggesting that, for example, their
5 discussion of what staking is or what Coinbase's wallet
6 functions as, are you suggesting I can't consider those to the
7 extent that they differ from the way in which the commission
8 has described these things in their complaint? I would have
9 thought that those things, for example, are in fact integral to
10 the complaint, but I'll hear from you.

11 MR. COSTELLO: I think the easiest way to look at
12 this, your Honor, is that I think what Coinbase has done in its
13 answer -- optics aside of course -- is to just demonstration
14 why this motion in the context of a 12(C) is just
15 inappropriate. When it comes to all of the issues here, be it
16 the investment contract related or be they major questions, or
17 as your Honor mentioned, the staking program, Coinbase has a
18 very different view of the facts, and that's fine. They can
19 have a different view of the facts. And the SEC views the
20 securities transaction component of this one way and Coinbase
21 views it a different way.

22 That is just, I think, more -- I think the -- it's --
23 I'm trying to say, your Honor, that I'm not just sure that a
24 12(C) is really the right venue to be resolving that factual
25 dispute. And I think your Honor may actually have hinted at

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1 this during the premotion conference where just wondering about
2 whether the 12(C) is the right place to be addressing this.

3 THE COURT: Well, I did and that's why I'm asking the
4 question again, sir, because I now have a more complete record.
5 I guess the issue is let's imagine the commission has described
6 staking in a manner that runs contrary to everyone else's
7 description of it. The DeFi people example have a fine Amicus
8 brief explaining to me what the wallet really is and what
9 staking really is, and that actually in some respects makes
10 more sense to me than the commission's description of it in the
11 complaint. You are suggesting to me that that is a factual
12 with dispute I simply can't resolve. Even if, for example, the
13 commission's description of staking is demonstrably wrong, yes?

14 MR. COSTELLO: If there is a factual dispute, your
15 Honor, I would say that the Court would not be able to resolve
16 that. But if you look at the two different versions -- and
17 there are a number of different points that the Amicus parties
18 raised, but if the Court is drawing reasonable inferences from
19 the allegations even though the two different versions of that
20 from two different perspectives may differ, the Court would be
21 required to draw those inferences in the SEC's favor at this
22 point given the nature of the 12(C).

23 THE COURT: Well, related to this question, sir, is
24 the question of the degree to which I can take judicial notice
25 of the factual statements that are contained in the amicus

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1 briefs. I'm thinking off the top of my head of the historical
2 presentation given by what I'll call the Securities Law
3 Scholars -- I think that's how they refer to themselves -- and
4 the background materials, sort of the crypto for dummies that
5 is presented in the DeFi Education Fund brief. Are you
6 suggesting that I can consider those facts except to the extent
7 that they are disputed or somehow controverted by what the
8 commission alleges?

9 MR. COSTELLO: I think the Court could read it as
10 background in considering the legal arguments that are raised,
11 but if it comes to presenting a different version of the facts,
12 that's where I would suggest that the Court not consider it, at
13 least not at this stage of the process. If we were to be back
14 here later on on summary judgment where there to be a fuller
15 factual record, then things might be different.

16 THE COURT: I don't recall the commission's briefing
17 anywhere, or their pleadings, containing a historical analysis
18 of the antecedents of *Howey*. Are you suggesting -- to what
19 degree can I consider this information in the absence of
20 contrary information from the commission?

21 MR. COSTELLO: If the Court is asking can the Court
22 look to the different cases that were cited in those briefs,
23 then certainly the Court could do that.

24 THE COURT: Okay. But it's more than that. They are
25 suggesting to me that if I look at those cases I'm going to

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1 discern a common fact or a common legal position in those cases
2 and that that would inform how I should view what *Howey* was
3 thinking when *Howey* was decided. You don't -- it doesn't sound
4 or at least you haven't presented in your briefing an opposing
5 narrative to the legal foundations of *Howey* or how they
6 progressed from state blue sky laws.

7 So I just want to know does that mean that you don't
8 dispute what they are saying or do you think that it doesn't
9 fully answer the question?

10 MR. COSTELLO: No, your Honor. That is -- we are
11 disputing that and I think that the easiest way to look at this
12 is that if you look at how *Howey* itself analyzed these cases,
13 the foundational principal that comes out of *Howey* in this
14 concept of looking at substance of a transaction, and
15 disregarding form to focus on the economic reality, that
16 principal of *Howey* comes from Justice Murphy's review of the
17 blue sky cases. And we've looked at what the Securities La
18 scholars have said about these cases and I'm just not sure that
19 you see a principle coming out of these cases like they say
20 there is that in the context of these things an actual contract
21 is required.

22 Factually, and as the posture of those cases showed,
23 they may have involved a contract, but that is different than
24 saying it is a mandate coming from these cases. And I think
25 that's the point that Justice Murphy was trying to get at

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1 there, that in discerning what the concept of an investment
2 contract is, the focus is on the economic reality where you are
3 to take the substance to be -- to disregard the form. That is
4 the way they extrapolated the principle from those cases. And
5 I'm just not sure that the Court needs to really get into the
6 detail of those cases to see how the Supreme Court itself
7 interpreted them.

8 THE COURT: I'm changing topics, sir. As I understand
9 the commission's complaint, there seems to be four Coinbase
10 services that are being challenged. The digital assets fi
11 exchange, the prime service for institutional customers, the
12 Coinbase wallet and the facilitation of staking. Are those the
13 services, the products, that are being challenged in the
14 complaint? Am I missing something is what I'm saying, sir?

15 MR. COSTELLO: No, your Honor. Your Honor is not
16 missing anything.

17 THE COURT: Okay. Mr. Tenreiro agrees with you. I'm
18 sorry. He's providing silent commentary to everything, so
19 thank you.

20 And I'm assuming, sir, not to give anything away
21 because I've decided nothing, but I'm assuming that it isn't a
22 binary decision with respect to all four. I could find, for
23 example, that there's something of concern at least for going
24 to discovery with respect to the exchange but not with respect
25 to the wallet, correct? I consider each of those individually

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1 although there's some arguments that are common to all?

2 MR. COSTELLO: That's correct, your Honor.

3 THE COURT: There are references in the commission's
4 briefing and there's I think a footnote somewhere that speaks
5 about the asset hub and at that moment seems that the
6 commission is talking about primary offerings in the
7 securities. But I did not understand that to be the meat of
8 the complaint. To what extent are you asking me to look at
9 primary transactions as distinguished from transactions in the
10 secondary market, which is what I understand the exchange and
11 the prime services really pertain to?

12 MR. COSTELLO: As we understand the asset hub feature,
13 your Honor, we understand that to mean that issuers are able to
14 sell their crypto tokens directly as your Honor observed.
15 Coinbase, just judging by the answer that they've interposed
16 seems to take a different issue as to what features this asset
17 hub actually entailed. So there seems to be a little dispute
18 between the parties at least as of this point as to what the
19 asset hub feature is and what it isn't.

20 THE COURT: Do I need to resolve that dispute for
21 purposes of this motion?

22 MR. COSTELLO: Well, I'm not sure that the Court can
23 resolve the dispute for purposes of this motion.

24 THE COURT: Okay. Fair enough. Let me ask the
25 question differently. If I issue a decision that nowhere

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1 mentioned the term "asset hub," have I missed something?

2 MR. COSTELLO: No, your Honor. If your Honor denies
3 the motion such that this case continues, then the asset hub
4 obviously will be a point of contention between the two parties
5 going forward.

6 THE COURT: Sir, as we talk about the principal
7 charges, the *Howey*-related charges. I want to be sure I
8 understand what is the conduct about which the commission
9 complains. So can you outline for me for each of the four
10 services provided by Coinbase precisely what it is that you
11 believe Coinbase is doing as to each that runs afoul of the
12 securities laws?

13 MR. COSTELLO: So, your Honor, I'll be happy to
14 address the primary claim. I think your Honor's questions
15 about the staking and the wallet service I'll defer to my
16 colleague on that one to explain to the Court in a little bit
17 more detail. But essentially, the primarily claim on the
18 securities front here is Coinbase's exchange, it's clearing
19 agency, and it's broker service, which my colleague will
20 address in a moment. But just looking at the exchange and the
21 clearing agency service, what we contend is that there are
22 securities transactions that are taking place on Coinbase's
23 platform. And Coinbase disputes that, and you know, that is
24 what it is. But in our view, the securities transactions are
25 taking place, which would mean that Coinbase is currently

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1 operating as an unregistered exchange and an unregistered
2 clearing agency. An exchange in the sense that a marketplace
3 for bringing together orders of buyers and sellers as the
4 exchange act defines what an exchange is. And a clearing
5 agency in the sense of settling transactions, ensuring that the
6 transaction goes from buyer to seller. And that also is
7 defined by statute. And our complaint takes through each of
8 the elements of that. But it's essentially Coinbase's
9 intermediation services in that sense that are at issue.

10 THE COURT: And the answer you've just given me is
11 principally focused on the exchange and the prime services,
12 correct?

13 MR. COSTELLO: Correct.

14 THE COURT: In your complaint, you make a point of
15 saying or you make a point of suggesting that there is some
16 novelty to combining exchange and broker and clearing services.
17 I'd like to understand that a little bit more. I believe that
18 Coinbase disagrees with you and says it's not that big a deal,
19 but you've made mention of the uniqueness of it, and I'd like
20 to understand why I should care.

21 MR. COSTELLO: So typically, your Honor, you do not
22 see those three functions, exchange, clearing agency and broker
23 combined under one roof, so to speak. And the reason that you
24 don't see that is because of a number of potential problems
25 that that poses. For example, if you look at a properly

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1 regulated and licensed exchange, the members on that exchange
2 are the broker-dealers. If you have an exchange itself that is
3 also performing a broker function, that presents the potential
4 for a conflict of interest in terms of when broker-dealer
5 orders are placed, the exchange might be tempted to place its
6 own broker-dealer function ahead of the orders of the other
7 brokers.

8 In another sense, it presents another conflict in the
9 sense that the exchange might be prone to using the
10 confidential customer information from these other
11 broker-dealers to its competitive advantage over the brokers.

12 THE COURT: Right. Neither of these is alleged in the
13 complaint though, correct?

14 MR. COSTELLO: No, that is not alleged in the
15 complaint but that is so that the Court understands why these
16 functions are normally not combined under one roof.

17 THE COURT: Fair enough. I appreciate you. Let me
18 try and sharpen my question then.

19 You've just indicated to me that there are reasons why
20 you would want to not combine those functions, and I appreciate
21 some of the reasons that you've given and I'm sure there are
22 others. How does the combination of those functions as alleged
23 here impact your claims of violation of the securities laws?

24 MR. COSTELLO: The separation of the functions, or I
25 should say the failure --

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1 THE COURT: Can we pause for the moment off the
2 record. Back on the record. Please continue, sir.

3 MR. COSTELLO: Your Honor, the issue here is not that
4 those functions are combined because there's nothing per se
5 illegal about combining the functions. But the fact is that
6 the commission has never registered an entity that has those
7 combined functions. The issue here is --

8 THE COURT: Could you say that again the commission
9 has or has not registered an entity that combines those
10 functions.

11 MR. COSTELLO: So the commission has never registered
12 an entity that has a combined exchange and clearing entity
13 function. It also never registered an agency that has an
14 exchange broker-dealer combination function. But there is not
15 anything per se illegal about it. That is not really the gist
16 of what our claim is here. Our claim is not that they combined
17 the functions. Our claim is that there are these securities
18 transactions taking place on Coinbase's platform, and because
19 there are Coinbase in acting as an unregistered exchange has
20 violated the securities law. And Coinbase acting as a clearing
21 agency has violated the securities laws as well.

22 THE COURT: Is the logical extension of your argument
23 the argument that the 12 or 13 issuers, depending on whether
24 you count Nexo, N-E-X-O, that they are all violating the
25 securities laws as well, because they are issuing securities

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1 that are not registered? Do I understand that? I mean, I
2 understand they are not in the complaint before me, but I'm
3 assuming if what you're arguing is that Coinbase is somehow by
4 providing these intermediation services violating the
5 securities laws that the actual token issuers are themselves
6 violating the securities laws; is that correct?

7 MR. COSTELLO: Well, not exactly, your Honor.

8 THE COURT: Okay.

9 MR. COSTELLO: Because if we look at the platform
10 itself you were talking about -- and your Honor observed
11 earlier that the bulk of our complaint is directed towards
12 secondary market trading. And so if you look at the secondary
13 market resale of a token, the seller of that digital token is
14 not the issuer at that point. It is a private party who was
15 actually the offerer or seller.

16 THE COURT: Yes.

17 MR. COSTELLO: Every sale of a security has to be
18 either registered or exempt. But what you are going to see
19 here is that the bulk -- nine out of ten sales in this context
20 are not going to trigger the registration requirement between,
21 you know, a private seller and a private buyer because section
22 4 of the Securities Act provides exemptions for registration.
23 And one of the most common exemptions is what we call the
24 4(a)(1) exemption, which exempts all offers or sales other than
25 by an issuer, an underwriter or a dealer. So these

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1 private-party resales that you see taking place, that is not
2 going to trigger a violation of the securities laws in the
3 sense of registration.

4 THE COURT: But what about the initial offerings of
5 the tokens? When the issuers decided to issue the tokens, the
6 SOL, or S-O-L, for example; do you believe they were issuing
7 securities?

8 MR. COSTELLO: If -- yes, your Honor. Yes, we were.
9 And if those transactions were not registered, then yes. Or
10 exempt, I should say.

11 THE COURT: I'll ask the question just to make sure I
12 understand this better.

13 I appreciate that earlier I asked you to -- whether
14 you were focusing on primary or secondary transactions, and I
15 appreciate your answer on that. You're saying that as to these
16 12 or 13 tokens, when they were initially issued, these tokens
17 were themselves securities?

18 MR. COSTELLO: Yes, your Honor.

19 THE COURT: Okay. Okay. I understand the argument.
20 I appreciate that. We're not claiming that Coinbase is the
21 issuer. You said they've provided intermediation services.
22 I've heard them in their capacity as a broker, in their
23 capacity as a settler of trades. Are you arguing that they are
24 a promoter in any respect?

25 MR. COSTELLO: A promoter of the offer or sale not in

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1 the traditional sense of what you would call promotion.

2 THE COURT: Okay.

3 MR. COSTELLO: So no. For example, your Honor may
4 have seen in some of the *Howey* cases the concept of a promoter.

5 THE COURT: That's what I'm thinking of, sir, yes.

6 MR. COSTELLO: Correct. No, not in that context, no.

7 THE COURT: And so from your perspective the liability
8 adheres in the fact that they are a third party whose conduct
9 can impact the value of the token, or is it that they are -- I
10 mean, what's the third party that I care about here? The *Howey*
11 test speaks to it. So what is the third -- is it the actions
12 of the issuers themselves, the actions of individuals in the
13 orbit of the issuers, or the actions of Coinbase? What am I
14 focusing on?

15 MR. COSTELLO: The focus is going to be on the actions
16 of the issuer and the developer of the project team together,
17 so what you would call the issuer just for -- you know, if I
18 want to lump them altogether as one category. And that is the
19 focus because the issuer is in charge of maintaining and
20 expanding the network that surrounds this digital token. And I
21 think it's important for the Court to understand that the
22 practical application of this. Because at the end of the day,
23 these 12 or 13 tokens, they are just computer code. Okay?
24 Those tokens are linked.

25 THE COURT: I'm smiling, sir, because that's kind of

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1 what your friends at the back table are saying and they are
2 wondering where we're here. So okay, yes.

3 MR. COSTELLO: I promise, your Honor, I will get you
4 there. So it is just computer code. And the computer code is
5 linked on a blockchain because a bunch of letters and numbers
6 that live on that blockchain. But the key here is that these
7 letters and numbers from this code go with that blockchain and
8 its surrounding network or ecosystem, you'll see sometimes the
9 cases use. It's that network or ecosystem, that is what drives
10 the value of the token because the token as code is linked to
11 that ecosystem. It is tied to it. It cannot be separated from
12 it.

13 As the value of that network or platform or ecosystem
14 increases, so does the value of the token. And the issuers and
15 the project team, they drive the value of the ecosystem. So
16 your token being part of this ecosystem is going up or down in
17 value based entirely on what these issuers and project team
18 members are doing and continuing to do. So it is their conduct
19 that would be relevant for the *Howey* analysis.

20 The way Coinbase fits into this is aside from
21 facilitating or I should say intermediating the transaction as
22 by serving as the exchange for this, Coinbase is also
23 rebroadcasting all of this by linking to all of the material of
24 the issuer and the project team right there on the platform.
25 When a customer opens an account on Coinbase and wants to look

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1 at different tokens to purchase and sees one of these 13 in
2 particular as examples, they can click on it and they can be
3 linked right there to all of this information including the
4 value proposition for these tokens based on what these issuers
5 and project team members are doing. So the focus --

6 THE COURT: Okay. But -- please pause. What if
7 Coinbase didn't include that information? You refer to it as
8 broadcasting; they refer to it as simply the provision of
9 historical information. Had they not done that, would you
10 still believe these intermediation services to bring them
11 within the securities laws and if so, on what basis?

12 MR. COSTELLO: Yes, the answer is yes. And the basis
13 is because regardless of whether or not Coinbase is
14 rebroadcasting it, that doesn't change the calculus of what
15 these issuers and these ecosystems are. All we're saying is
16 that Coinbase rebroadcasts and amplifies it right there on the
17 platform. But even if they didn't, that wouldn't change the
18 analysis.

19 THE COURT: Okay. And so therefore the fact that --
20 it's simply their placement of these assets on their platform,
21 but didn't of the fact that in your view the assets themselves
22 are securities. The placement of these securities on their
23 platform, either at the spot or the prime, that's enough. I
24 mean, it's gravy as far as you're concerned that they've
25 also -- that they also provide information. And I suppose you

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1 would say it's even more interesting that there are efforts
2 made to improve or to enhance or to develop their own customer
3 base by having them purchase these assets. But if we're
4 looking at that irreducible minimum of conduct that brings
5 them, you believe, within the ambit of the securities laws.
6 It's the placement on their platform of tokens that you believe
7 to be securities?

8 MR. COSTELLO: Yes, your Honor, but let me just
9 clarify, though.

10 THE COURT: Please.

11 MR. COSTELLO: The token itself is not the security.

12 THE COURT: I understand that. Right. And that's
13 good. Was it Mr. Hinman or someone else who said that?
14 Someone from your shop who is no longer there has said that, so
15 yes. Token alone, not a security. So tell me what makes these
16 the securities?

17 MR. COSTELLO: This goes to what I said before
18 about --

19 THE COURT: The ecosystem?

20 MR. COSTELLO: About what it is that someone is buying
21 when they purchase the particular tokens like this, like these
22 13 examples. When they buy this token, they are investing into
23 the network behind it. One cannot be separated from the other.
24 One is the other effectively. And they -- when they are
25 investing in this, when the value of the network or the

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1 ecosystem increases, so does the value of the token. That is
2 the way that Judge Rakoff looked at it recently in the
3 Terraform decision, noting that it is the token essentially
4 plus the totality of the inducements about what makes the
5 ecosystem, the ecosystem.

6 So that is what translates this to here. And when it
7 comes to Coinbase's conduct, the fact is that because they meet
8 the definition of an exchange -- and I don't think that they
9 are debating in this case that they otherwise meet the
10 definition of an exchange, and they meet the definition of a
11 clearing agency based on the types of services and functions
12 that they do. I think the dispute here is that they are a
13 securities exchange and a securities clearing agency, because
14 those statutory provisions would only be triggered if there are
15 securities transactions taking place. That, I think, is the
16 dispute between the parties here.

17 But Coinbase's conduct would be if purchases and sales
18 of these tokens, these transactions, these investments into
19 these networks, if that is -- if the Court finds those to be
20 securities transactions, then, by definition, Coinbase is
21 operating as an unregistered exchange.

22 THE COURT: I suspect that I might have broader
23 questions on this issue in a little while for you. But I am
24 interested in the first instance about your argument to me just
25 now that the token alone is not a security but that the person

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1 buying the token is buying into a system. You've referred to
2 it earlier as an ecosystem. How do I know or how have you made
3 the determination that a particular token brings -- the
4 purchase of a particular token brings with it entree into a
5 system as distinguished from just having an asset that is not a
6 security?

7 I'm trying to figure out what about these particular
8 tokens allow you to make the argument that their purchase is
9 not just the purchase of an asset but the purchase into a
10 system that implicates the securities laws?

11 MR. COSTELLO: Sure, your Honor. I think the easiest
12 answer to that question is that transactions in these
13 particular 13 tokens satisfy the *Howey* test. That's what makes
14 them securities.

15 THE COURT: That's a little bit circular to me, sir,
16 so we'll try that again.

17 You're saying to me that if I were to go onto Coinbase
18 right now and if I were to set up an account, that I can get
19 any number of assets that in the commission's estimation are
20 not securities, correct?

21 MR. COSTELLO: I just want to clarify something, your
22 Honor.

23 THE COURT: Please.

24 MR. COSTELLO: What we've done in this case is we have
25 pointed out 13 examples of digital tokens where we believe

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1 investment contract securities are taking place. We have not
2 looked at all of the tokens that are trading on Coinbase's
3 platform, but as I think we had mentioned at the premotion
4 conference, it would be sufficient for the Court to find that
5 just one token is a securities transaction. We've pointed out
6 13 where we have -- the commission has made the determination
7 that it believes that these transactions in these 13 tokens are
8 securities transactions.

9 THE COURT: I did understand that and I did not think
10 that by citing these 12 or 13 you were excluding all of the
11 others. What I'm trying to figure out is: What is it about
12 the issuance of these tokens? What is it about these tokens
13 that brings them within *Howey*, and for you to say well, they
14 satisfy *Howey* is not a helpful answer to me.

15 For example, there's a fair amount of description in
16 your complaint about what the issuers were intending to do,
17 what statements they've made, what it is about -- for example,
18 whether these tokens are promoted and geared towards either
19 advancing the blockchain or the goals of blockchain or
20 developing apps for the blockchain. That's what I'm trying to
21 figure out.

22 You're acknowledging, I think, the theoretical
23 possibility that there's stuff on Coinbase, there are assets
24 that are not securities. I understand that you've identified
25 these 12 or 13 that are. What is it about them, and please

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1 don't say *Howey*. What is it about them that you believe makes
2 them securities? Thank you.

3 MR. COSTELLO: Understood, your Honor. I apologize
4 earlier. I misunderstood the question.

5 THE COURT: I wasn't asking a precise enough question.
6 I think maybe I did now.

7 MR. COSTELLO: I think maybe it would be helpful if we
8 looked at one or two tokens in particular so we could
9 illustrate the point about what we think is making these
10 investments. Because at the end of the day, that's what this
11 is, it's an investment. Essentially, the investment depends
12 entirely on the efforts of other people to bring value to that
13 investment.

14 So if we look at the CHILI token, for example, that
15 the CHZ token. That's a sports and entertainment platform. If
16 you look at how we track through the development of this, you
17 see in a lot of these instances, these token issuances come
18 about when the blockchain and the network first launches. And
19 to do that these issuers and project teams need start-up
20 capital, so they will sell a certain amount of tokens to
21 institutional type investors to get the development capital
22 that they need had to launch the blockchain. And that can be
23 done -- this is not just for the CHILI but this is for all of
24 them. That can be done in a combination of direct placements,
25 initial exchange offering and SAP agreements, simple agreements

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1 for future tokens where the institutional investor will get the
2 right to a certain amount tokens after launch.

3 I'm sorry. Am I speaking to fast? I apologize.

4 So they set this up, and then what they do with that
5 capital is they then launch the blockchain, they launch the
6 network and then they continue to expand and add value to it?
7 How does that play out in real practice? Well, if you look at
8 CHILI, the CHILI, the original white paper and its website
9 feature biographies of the founders and their project team
10 highlighting their past managerial and entrepreneurial
11 background.

12 They then explain how they allocated certain
13 percentages in those initial formation that I was talking about
14 earlier, the CHILI issuer had allocated certain percentages of
15 those -- of the CHILI token to the founders and the project
16 team to show, essentially, that these individuals, these
17 founders, these developers have ongoing invested interests in
18 this enterprise at the end of the day because they own tokens
19 as well. And it's to their advantage to do whatever they can
20 to improve upon and expand this value because when they do
21 that, they benefit, too.

22 Now, in 2018, three years before CHILI was listed on
23 Coinbase's platform for trading, CHILI released another white
24 paper stating that they are no longer looking to fundraise at
25 this point. They are now looking to focus on leveraging

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1 resources to realize what they called their vision for the
2 ecosystem. Then the team has also stated publicly that as they
3 are able to grow the platform and partner with more of these
4 digital sports teams, because it's a sports and entertainment
5 platform. As they're able to partner with more of these teams,
6 the value -- and this is where this comes into play, the value
7 of the token will increase.

8 In fact, in one tweet that they sent out, it's "demand
9 for CHZ exploded. Going to bring a lot of value." And then
10 they also made efforts to drive secondary market trading by
11 burning, and that's a term for, you know, creating scarcity in
12 the tokens to make them more valuable. So if you look at that
13 as an example -- and the various tokens they all follow the
14 same initial track of that developmental capital that starts it
15 out and then it expands beyond that. But this is just an
16 example to show that this is the way that these issuers and
17 these developers are looking at the tokens and the networks,
18 the ecosystem themselves. They are looking at it as value
19 propositions, and then they are broadcasting this information
20 publicly so that demand is going to increase.

21 And that is the way that we have characterized the
22 allegations in this complaint. Because at the end of the day,
23 when it comes to applying *Howey*, it is an objective test, it's
24 principles based. It looks at all the facts and circumstances.

25 We view the transactions in these particular tokens as

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1 presenting as value propositions. As Judge Rakoff noted, when
2 you purchase this token, you invest in that platform.

3 THE COURT: Do you mean that at both the developmental
4 stage and the expansion stage, or to you, is one set of tokens
5 at one particular stage not a security and later since, is a
6 security. By the way you are describing CHZ, it would seem
7 they were always thinking about how to enhance the value of the
8 CHZ token and, therefore, the initial developmental offering
9 and the advance and expand offering are both -- the tokens that
10 resulted there are both securities in your conception of
11 things, which I understand the folks at the back table disagree
12 with. Is that what you're saying.

13 MR. COSTELLO: Yes, your Honor. It doesn't make a
14 difference whether you have it initially or whether you get it
15 secondarily. This actually highlights one of the major
16 disputes between the parties, because the question becomes, if
17 you have an investment contract that can be created when you
18 buy something -- when you buy one of these tokens from the
19 issuer, that Coinbase seems to think that you can't then trade
20 that in the secondary market. And this is where both sides
21 part company a little bit.

22 We think if the Court looks at this for what the items
23 are, this is a digital token. It is computer code that links
24 to a blockchain. Whether your Honor is the first person to buy
25 this particular token from this particular computer code, or

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1 whether your Honor then sells it to me and then I sell it to
2 Mr. Tenreiro, it is the same computer code no matter which one
3 of us has it. It's still the same value proposition.

4 THE COURT: And so this is where you are disagreeing
5 with Judge Torres in the *Ripple* case?

6 MR. COSTELLO: Correct, your Honor. And the reason we
7 respectfully disagree with Judge Torres --

8 THE COURT: Of course.

9 MR. COSTELLO: -- is because when you have those
10 problematic, those would be the retail purchasers. When they
11 are buying XRP, they are buying the same XRP token that the
12 institutional buyers are buying. It doesn't matter whether
13 they buy that from Ripple or from a secondary seller. It
14 doesn't matter. It's the same token in the same ecosystem.
15 There's no need to create two different categories of
16 purchasers in that sense. And there's no need to do that here
17 either.

18 We just think if the Court looks at the reality of
19 what the transactions are in, being these digital tokens being
20 computer code, it doesn't matter who possesses it, it's still
21 the same investment in the same thing.

22 THE COURT: In the commission's review of the tokens
23 that are offered on Coinbase -- and I appreciate that I'm
24 asking you now on something you didn't allege, did you find
25 tokens that are there that someone could buy for sport? I

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1 mean, for no appreciation? I'm just trying to figure -- I
2 would have thought that everybody buying a token on Coinbase
3 hopes one day that that token will appreciate in value, but
4 perhaps you've seen tokens where there was no ecosystem. And
5 if so, if it's possible, could you give me an example of one of
6 those, where you looked at it and said this does not qualify.

7 MR. COSTELLO: I believe that the commission has taken
8 the position that the Bitcoin token is not a security. I think
9 that is -- and I believe that you can purchase Bitcoin on
10 Coinbase's platform.

11 THE COURT: Is that because it's effectively currency,
12 it's a replacement for fiat currency or something else?

13 MR. COSTELLO: I think the way to look at that is,
14 again, to come back to your Honor's question about the
15 ecosystem, there's no ecosystem behind it. And I think that's
16 the easiest way to look at it. Because the way we view these
17 13 particular tokens is that you are buying the token and the
18 totality of the inducements. If nobody is inducing anything,
19 then you can't be buying that in a sense. And I think you see
20 in instances like Bitcoin, it lacks that centralized function.

21 Now with respect to the others, as I have said, I
22 don't know that we've analyzed all of the tokens on there. I
23 think we've just looked at these particular 13. Now, it's
24 possible, even with these 13, I don't know if I'm sensing your
25 Honor's next question or not.

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1 THE COURT: I doubt it.

2 MR. COSTELLO: But when people purchase these 13
3 tokens, is it possible that some people are buying these
4 particular 13 to -- for utility, to use instead of to invest?
5 That is possible but that's not the way to look at it.

6 THE COURT: Well, I guess it's possible. I thought
7 your argument would be -- which is why it wasn't my next
8 question, was that you've alleged that at least someone out
9 there is buying for an appreciation of value, and I have to
10 accept that at this stage. So the fact that there might be
11 someone who just likes the name or thinks that there's
12 something about the issuer that's cool for them, I get that. I
13 get that there are people who are not -- I'm imagining that
14 somewhere out there there's someone with more money than brains
15 who is buying just to buy. But that's not what you are
16 alleging in the complaint and I'm accepting your allegations,
17 which is why I didn't ask that question. Let me please do
18 this. I'm going to give you a break.

19 I have many more questions to ask, but I'm going to
20 turn to Mr. Margida for a moment because I want to have sort of
21 an intermission to talk about the staking and the wallet
22 programs.

23 Sir, again, I found very interesting the DeFi
24 education organizations, amicus in this regard. Are they wrong
25 in their description of what the wallet is? Are they wrong in

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1 their description of what staking is? Or if you would like me
2 to ask the question differently: Can I accept their factual
3 statements about how these things operate?

4 MR. MARGIDA: Your Honor, I can answer it two ways.
5 One, I think they are wrong, but I think the more relevant
6 point is what my colleague, Mr. Costello, referred to earlier,
7 which is I think Coinbase and DeFi education fund get it wrong.
8 But you don't need to consider it at this stage of the
9 litigation, because what you are talking about is Congress
10 defined broker broadly in the Exchange Act. But we have this
11 judicial test, and both parties have agreed to that, so I'm not
12 going to go over it. But you are talking about the application
13 of a nine-factor test where the parties have factual disputes
14 about the extent to which Coinbase acts as a broker through its
15 wallet application.

16 So I think what the DeFi Education Fund and Coinbase
17 are doing is minimizing the function and the substance of what
18 wallet is and does by emphasizing that it provides -- that it's
19 run through software, that it provides a technical interface.
20 But at its core, what wallet does, Coinbase, acting as a
21 broker, actively solicits investors for its wallet program.
22 The investors download the app, and the app, even though it
23 only takes a couple seconds, what wallet does is significant.

24 So Coinbase, in its briefing, talks about going to a
25 store and you pull cash out of your wallet. It's just like

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1 that. That's wrong. You or I or any retail investor cannot
2 like going into a 7 Eleven to buy a Big Gulp. You can do that.
3 You don't need a wallet to do that, you can take \$20 or \$3 and
4 buy a Big Gulp.

5 To access and engage in the securities transactions on
6 wallet, Coinbase is essential. I don't have a relationship
7 with DEXs out in the crypto universe. I can't pick up a phone
8 and make my own connection with them. Coinbase provides that
9 for its investors.

10 The swap feature that Coinbase markets as part of its
11 wallet feature is instructive. What the swap feature does is
12 I'm a wallet user, I log on to the app, I want to trade one
13 crypto asset for another. Coinbase through its wallet
14 application will access liquidity in the DEX market. It has
15 relationships and establishes connections with dozens of DEXs.
16 It will go out and find a DEX that will satisfy the asset I
17 want at the quantity I want to find that liquidity.

18 (Continued on next page)

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1 MR. MARGIDA: It will compare prices across the DEXs
2 that satisfy the liquidity request. It will do all of this in
3 seconds. And this isn't pleaded, but we define swap in the
4 complaint, your Honor, and at page 27 of our opposition we cite
5 Coinbase's website which defines the swap or the trade as using
6 the protocol within the DEX aggregator and the OX protocol to
7 go out and find to compare prices for that liquid and present,
8 find the best price and present it as a proposal to the user to
9 either accept or not.

10 That is not just a technical interface. That is
11 providing brokerage functions, soliciting investors, routing
12 orders, providing advice in the form of a proposed swap. That
13 is essentially it actually goes farther than what Vanguard or
14 E*TRADE would do. Nobody claims that Vanguard or E*TRADE isn't
15 an online brokerage because they provide automated tools for
16 users to effect and participate in securities transactions. So
17 I think Coinbase and the DeFi Education Fund, they are wrong in
18 the sense that they're minimizing the function and effect and
19 substance while waving around the fact that it's technology. I
20 think that's a red herring, your Honor.

21 THE COURT: And you said, similarly, a red herring in
22 your estimation that Coinbase hasn't taken a fee for the wallet
23 service since April of 2023. If we were just to think about
24 the wallet function today, does the fact that Coinbase is not
25 today charging anything for it make it any less or implicate

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1 any less the securities laws?

2 MR. MARGIDA: No, your Honor. The commission's
3 entitled to bring enforcement actions for historical and
4 ongoing violations. We've essentially brought them --

5 THE COURT: I'm sorry. I'll ask a better question.

6 When they were charging a fee for Wallet, it was
7 easier for you to say that there's somehow some violation
8 because not only are they performing these services that you
9 believe transcend a technical interface, but they're charging
10 something for it. Right now, today, they're not charging
11 something for it. Is it still violative or does it still
12 implicate the securities laws? And if so, what specific part
13 of Wallet implicates the securities laws?

14 MR. MARGIDA: Okay, your Honor. Putting aside the
15 transaction-based conversation, it is still a violation. *GEL*
16 *Direct* and *Hansen* and other cases tell us there are multiple
17 factors, of which transaction-based compensation is one, but
18 not a mandatory or required one. We have alleged several other
19 factors in our complaint including active solicitation of
20 investors, the routing of orders, and the giving of advice for
21 the reasons that identified in my prior answer, your Honor.

22 THE COURT: All right. Thank you. One moment,
23 please.

24 Let's then turn to staking. You or one of your
25 colleagues at our last oral argument expressed surprise that

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1 Coinbase was moving to dismiss the stakes claim. Whoever the
2 oralist was, their view was that actually staking was the a
3 strong claim by the commission. I found staking to be the
4 least traditional-investment-like of the functions that you
5 were complaining about here. So I'd like to understand what it
6 is about that, what is it that Coinbase does in the staking
7 context that brings them within the ambit of the securities
8 laws?

9 For instance, the validation protocol that is inherent
10 in staking, that's not like normal investing. I don't think of
11 it as such, and I thought your argument was that it was the
12 aggregation or the pooling of tokens in order to perhaps make a
13 particular group of stakers more interesting to the folks who
14 are using them to validate these transactions, that that's what
15 Coinbase did, but perhaps I'm wrong. What is it in the staking
16 context that Coinbase is doing that brings them within the
17 ambit of the securities laws?

18 MR. MARGIDA: Okay. Your Honor. I understand what
19 you're saying about validation services. I think what Coinbase
20 is doing is taking an established technology and building an
21 enterprise on top of it. I think *Edwards* and *Rubera* are good
22 examples of that where payphones exist and ETS, the promoter in
23 *Edwards*, says, We're going to create an investment program
24 based on that and we're going to use our technical expertise,
25 we're going to install the payphones, maintain them, repair

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1 them, collect the coins, and distribute investment returns.
2 That's essentially what's happening here.

3 Investors are giving up their crypto assets to
4 Coinbase's control. They are pooled, and then Coinbase is
5 using its managerial efforts to manage the enterprise, which is
6 the Coinbase staking program. They provide all the
7 infrastructure, they retain third parties, they operate the
8 validators to ensure greater odds of success so the investors
9 will actually earn the rewards that Coinbase is marketing.

10 THE COURT: You just said "they operate the
11 validators." May I understand what you mean by that?

12 MR. MARGIDA: They operate the validators at the nodes
13 of the respective blockchain protocols. Here, again, not
14 unlike with Wallet, your Honor, Coinbase is saying essentially
15 that because its efforts are technical, they cannot therefore
16 be managerial or entrepreneurial, and the case law does not
17 support that.

18 THE COURT: Well, I mean, you're both fighting over
19 what is ministerial and what managerial. And one of the
20 reasons I'm asking you what it is Coinbase is doing is to
21 figure out what it is you're upset about. The second thing is
22 the things that you're describing them as doing, I want to
23 know, do you define all of those as managerial as distinguished
24 from ministerial? I suspect, as well, this is another case
25 where you're going to tell me that irrespective of all the

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1 briefing on the issue and the differing conceptions, that
2 differing conceptions simply means that at this stage of the
3 game I can't dismiss the claim.

4 MR. MARGIDA: I do want to say that, your Honor, but I
5 won't because I think you just made the point.

6 THE COURT: This section of our argument is for me to
7 understand what precisely Coinbase is doing that you're upset
8 about. And particularly as to staking and Wallet, where
9 there's such a divergence between the parties as to what acts
10 Coinbase is doing, what it is you think they're doing.

11 MR. MARGIDA: Your Honor, that's a fair question.

12 I just want to bring it back to *Howey* compels us to
13 look at the economic reality of whether investors are giving up
14 their capital and pooling that capital with the promoter's
15 efforts. That's exactly what's being done here. And
16 Coinbase's arguments – and I understand they disagree with the
17 commission's allegations – they are elevating, impermissibly in
18 our view, form over substance.

19 What Coinbase is offering and what they have marketed
20 is that you can put your assets to work, not to validate
21 transactions or provide some other consumptive use, but to earn
22 returns on your investment. They give up their funds, Coinbase
23 pools them and uses them through their, yes, managerial
24 efforts, and the case law does not support Coinbase's view.

25 I understand Coinbase now is pulling back on

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1 everything it marketed that its staking program would do.
2 Staking on your own is complicated and costly, they said.
3 Coinbase will do all of that for you. That is --

4 THE COURT: They're right, right?

5 MR. MARGIDA: Absolutely. There are economic barriers
6 that prevent certain people from doing exactly what Coinbase is
7 providing. Same thing in *Gary Plastic*. There's an underlying
8 bank issuing a CD and Merrill Lynch creates an investment
9 program where it undertakes efforts to promote the program and
10 create a secondary mark. And then *Edwards* and *Rubera*, which I
11 mentioned, also provide potentially seemingly ministerial
12 things, but they are managerial efforts in furtherance of the
13 enterprise requiring no efforts from the investor to generate
14 the returns that they marketed. That is, under *Howey*, an
15 investment contract. That is the economic reality as we've
16 alleged of what's happening here.

17 THE COURT: Well, I guess I have two followups to
18 that. And the first is whether the parties are in agreement as
19 to the specific services that Coinbase is providing. And then
20 secondly, is whether one can fairly denote those services as
21 ministerial or managerial.

22 I guess, among these issues, there are claims by
23 Coinbase that the investors never actually lose their assets,
24 that they're always retaining custody. And I think in this
25 regard, to me, it sounded, for example -- and I realize this is

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1 very low tech, but I have money in a savings account, right?
2 You can use my money in the savings account. You can do
3 something with it. I presume the bank is doing something with
4 it, but I get interest on that. Is staking akin to interest
5 payments on a bank account?

6 And are you telling me it's not because – for example,
7 I'm never going to lose my bank account, and here one could in
8 certain highly unlikely but nonetheless identifiable
9 circumstances lose the asset? Because, again, there are two
10 things they're saying. They're saying the asset holder does
11 not give up its ownership of the asset, and they say there's no
12 real risk of loss. Are you disagreeing with them? Are you
13 suggesting that there's a disagreement that however it works
14 out I can't decide it at this stage or something else?

15 MR. MARGIDA: Well, I'm disagreeing with them, your
16 Honor, in that giving up legal ownership is not required. SEC
17 *v. Edwards* tells us that. The investors who purchased the
18 payphones that were essential to the enterprise were promised a
19 refund of their capital.

20 Coinbase's citation to its user agreement about
21 investors do not give up legal ownership, it's just irrelevant.
22 And there are risks, and we put this in the brief, your Honor,
23 so I won't go into it too much, but Coinbase is reading into
24 the investment of money prong of *Howey*, requirements that
25 simply do not exist. If there is a risk that is inherent to

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1 the only price like a cyber security incident or theft or loss
2 of private keys or Coinbase fails, that risk matters. Same
3 thing with slashing, which is a Coinbase specific risk --

4 THE COURT: Sure, but hang on. The likelihood of
5 slashing happening is really small, but the fact that it could
6 happen is enough? Is that your argument?

7 MR. MARGIDA: Coinbase admits in its answer that it
8 could happen. It says that it hasn't happened and we provide a
9 limited indemnity. But the risk exists, and that's enough.

10 THE COURT: What if they had a full indemnity? Is
11 that no longer an issue then? Have you lost that argument?

12 MR. MARGIDA: No, it's still an issue under *Edwards*
13 because they're guaranteed their money back. *Gary Plastic* is a
14 good case, your Honor, because it shows the risk. As the
15 Second Circuit noted, you could have the underlying bank, the
16 issuing bank of the CD go under, but you could also have
17 Merrill Lynch go under and not do what it promised to do as
18 part of the enterprise. All those risks matter, and so
19 Coinbase's attempt to identify and distinguish between Coinbase
20 risk versus non-Coinbase risk or staking risk versus
21 non-staking risk is irrelevant.

22 THE COURT: Well, you've answered my next question,
23 which is I believe Coinbase suggests that the risk needs to be
24 a staking-specific risk because they suggest, for example, that
25 certain things could have happen whether you solo stake or

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1 stake through their program. Certain things could happen if
2 you're just a customer of Coinbase and not a member of the
3 staking program. And there's a suggestion that there ought to
4 be something more, something staking specific.

5 You're telling me that under *Edwards* and cases like
6 *Edwards* there is no act-specific risk of loss that has to take
7 place, in this case, a staking-specific risk of loss that has
8 to be identified; is that correct?

9 MR. MARGIDA: That's right, your Honor. And I think
10 *Gary Plastic* respectfully washes away that argument because of
11 the risk I identified. The underlying bank could go under,
12 Merrill Lynch could go under, and all of that affects whether
13 investor assets are put at risk as part of the enterprise.

14 THE COURT: Just moving back a moment, sir, to my
15 first question, which I may have the answers to, but I want to
16 make sure I do. What is the staking conduct that Coinbase
17 does? I want it in gory detail. What is it that they're doing
18 that you believe brings them within the ambit of the securities
19 laws in the specific context of staking.

20 MR. MARGIDA: Okay. With respect to the efforts that
21 they market and that they undertake to further the enterprise?

22 THE COURT: Yes.

23 MR. MARGIDA: Is that what you're asking? Okay. So
24 Coinbase sets up the infrastructure with each of the five
25 blockchain staking protocols. They retain third parties, to

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1 actually carry out some of the staking. Although, as I
2 mentioned earlier, Coinbase operates its own validators as
3 well. It provides for increased server uptime, which is
4 important, because Coinbase, as we allege, pools investor
5 assets along withing Coinbase's own assets and stakes them as
6 validator nodes, and that increases the odds that Coinbase will
7 be selected to validate transactions and that protocol and
8 thereby increases odds of success of the enterprise.

9 Once Coinbase is selected or a third party is
10 retained, the validation needs to occur in a timely matter.
11 And that's where the slashing risk comes into play. Coinbase
12 provides maximum server uptime to allow for greater odds of
13 success. Then, when the returns are paid out and all the while
14 investor assets are staked at the protocol during what's called
15 a bonding period, investor assets are not able to be pulled
16 out – once upon a time, they were as a result of Coinbase's
17 liquidity pools, but apparently they no longer use those – and
18 then returns, Coinbase pays itself, and then it distributes
19 investor returns on a pro rata basis to investors.

20 THE COURT: How long does the bonding period last?

21 MR. MARGIDA: I believe it depends on which protocol
22 you're talking about.

23 THE COURT: Is it a matter of minutes? Seconds?
24 Days?

25 MR. MARGIDA: I believe days and ask weeks, your

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1 Honor.

2 THE COURT: Days and weeks, thank you. Okay.

3 Coinbase has argued that rewards that are set for
4 stakers are set by the individual blockchain protocols and not
5 by Coinbase. Do you disagree with that? Does it matter to our
6 analysis? I sense you're agoing to tell me that even if that's
7 true, it doesn't detract from all these other things you've
8 just listed for me, but let me actually have you answer that
9 question.

10 MR. MARGIDA: That's right. And to go back to *Gary*
11 *Plastic*. The issuing banks, the CDs set the rates. It's
12 immaterial. What Coinbase is doing is created on a larger
13 scale an opportunity to profit off of the staking
14 infrastructure. And for some of the reasons I identified
15 earlier, Coinbase's efforts make it more likely that investors
16 will receive returns because of the maximum server uptime and
17 because more assets are able to be pooled and staked at the
18 validator nodes. That's what's more relevant in my opinion,
19 your Honor.

20 THE COURT: Just one moment, please, sir. I think I'm
21 back to Mr. Costello. I thank you very much.

22 Mr. Costello, I know you're rested and ready to go
23 forward. We are back to *Howey*, sir. And as you know from
24 reading Coinbase's arguments, the argument that they're making
25 is that an economic arrangement can qualify as an investment

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1 contract only if it involves an ongoing business enterprise
2 where management owes some sort of obligation, I think an
3 enforceable obligation to investors. I think, as well, in a
4 later stage of their briefing they suggest that the investment
5 must implicate a claim on the proceeds of the business, rather
6 than on the thing that the business creates. In the
7 alternative, I believe they say you're going after just asset
8 sales.

9 Now, I appreciate that you're taking a different view
10 ask that's why we have this case. But just, again, looking at
11 what the limits of your arguments are, are you taking the
12 position that the purchasers through Prime or through the spot
13 exchange of these 12 or 13 tokens would have, if they wanted
14 to, one of the traditional private rights of actions under the
15 securities laws? For example, if I bought SOL and decided that
16 the — I don't want to cast dispersions on — let's say I bought
17 something that was not one of your 13, but was just rife with
18 fraud, like there's something to that in *Terraform*, I suppose.
19 But if I did that, what's my recourse as a purchaser? Are you
20 suggesting that by bringing this action you are by extension
21 enshrining the idea that crypto asset purchases, at least of
22 these 12 or 13, can bring 10b-5 actions? Or I suppose actions
23 under the '33 Act for selling unregistered securities?

24 MR. COSTELLO: I think what we're contending, your
25 Honor, is that when we're talking about contractual obligations

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1 beyond the point of sale, I thought that was Coinbase's
2 original position that they took in their briefing, at least in
3 their initial brief. And then in their reply brief, they
4 appear to have refined that somewhat. They appear to be saying
5 it's now the impression of a contractual undertaking, and I'll
6 address that in a moment.

7 But just on this concept of this contractual
8 obligation, what they're essentially looking at, as your Honor
9 observed, is the question of enforcement in a way. In other
10 words, being able to compel the issuer, for example, of the SOL
11 token to compel the issuer to actually do something. You know,
12 if the issuer has said, I'm going to expand this network and
13 add a whole bunch of new dApps and features, and if that's not
14 done, then what would the purchaser be able to do about it?
15 And the question is whatever the purchaser can do about it has
16 nothing to do with whether a security is present.

17 And this issue surfaced in *Joiner*, which was a long
18 time ago. And the Supreme Court in *Joiner* looked at this and
19 said that whether or not a purchaser of the leasehold interest
20 could actually compel the defendant to drill the test well,
21 which was the central feature of what made that an investment
22 contract, that was the inducement. And the fact that whether
23 or not the purchaser could compel the defendant to drill the
24 test well was what the Supreme Court said a question of state
25 law that we "find unnecessary to determine."

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1 Reason being, whether or not it's enforceable has
2 nothing to do with whether a security is present is the point.
3 And I think that's what Coinbase overlooks with this argument,
4 which I'm not sure if that's why they changed the argument in
5 their reply to talk about an impression of a contractual
6 undertaking. I'm not sure I know exactly what an impression of
7 a contractual undertaking is.

8 THE COURT: Let me explain, then, my concern. Let's
9 say I agree with you that certain of these tokens, at least one
10 of these tokens is, in fact, a security such that having these
11 things placed on the exchange or transacted through the Prime
12 service would amount to operating an unregistered exchange. My
13 concern is does that mean that every crypto asset purchaser of
14 those 12 or 13 securities can, if they decide they don't like
15 what happened, bring some sort of fraud action? I am being
16 selfish about my thoughts here. I don't know that I really
17 want to have that NDL.

18 You telling me whether enforceable doesn't mean it's a
19 security. Okay, fine. But I actually care about how you're
20 defining security because I want to understand not only how it
21 applies in this case, but what it's going to mean to individual
22 purchasers of these crypto assets going forward. And so you'll
23 understand that one of my concerns in this section of our
24 questioning concerns what are the limits? Are there limits?
25 Are there some guardrails in the commission's arguments?

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1 Because I am concerned, and several of the amici have suggested
2 I should be concerned that what you're asking for is too broad
3 a definition of what constitutes a security.

4 So I'm back to my original question, which is what
5 does my finding in your favor mean for the purchasers of these
6 12 or 13 tokens?

7 MR. COSTELLO: Your finding in that sense, your Honor,
8 would mean that the purchaser of the particular 12 or 13 tokens
9 has purchased a security, as in the form of an investment
10 contract. That would be the conclusion. And in terms of what
11 that means significantly, well, if it is a security, then it is
12 a security. Now, there have to be a whole host of other things
13 extraneous to this case that kind of come into play there as to
14 what to do about it.

15 THE COURT: Of course. And I'm not suggesting that
16 any or all of the token issuers are engaged any way in
17 fraudulent activity. But if you find, for example, that these
18 are unregistered securities, I would think that in the first
19 instance, the asset purchasers would have a right of
20 rescission. Am I mistaken about that?

21 MR. COSTELLO: They would. Under Section 12, they can
22 seek rescission, correct, your Honor, yes.

23 THE COURT: Okay. All right. So that's what I'm
24 trying to figure out. I care about how the law develops in the
25 case before me. I care, as well, about what it means going

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1 forward, which is why I'm asking about limiting principals or
2 exceptions or areas where even you agree your argument goes too
3 far.

4 So you've conceded that finding in your favor
5 potentially opens up the gates to private actions. It's not
6 merely the commission who can bring actions. There can be
7 private actions by the holders of the individual tokens if
8 certain circumstances were to happen, or at least if they were
9 to be alleged, yes, sir.?

10 MR. COSTELLO: Correct.

11 THE COURT: Okay. Now, one of the amici, the
12 Blockchain Association, faults you for arguing that any asset
13 purchased with an expectation that its value will go up based
14 on the entrepreneurial or managerial efforts of others is an
15 investment contract. Is that what you're arguing?

16 MR. COSTELLO: No, your Honor.

17 THE COURT: A few moments ago you were saying to me
18 you believed that Coinbase had itself pivoted and changed from
19 contract to something contract adjacent. Here, that is how
20 your test is being presented to me by someone in this space.
21 What is it that you're actually arguing for? You're saying
22 there doesn't need to be a contract, but there's got to be
23 something. So what is the something that there must be?

24 MR. COSTELLO: And that's a fair question, your Honor.
25 I didn't know if the Court wanted us to address that position.

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1 The problem with that characterization from the amicus party is
2 that's lacking a common enterprise. If you buy an item and you
3 hope that it goes up, that's a lot different than buying into a
4 common enterprise, and that, I think, is what this case is
5 about.

6 In terms of what we would look at here, what
7 qualifies, if you look at the way Judge Castel and Judge Rakoff
8 framed this issue in terms of what is happening in, say, a
9 retail setting, which would be what this is, if there is an
10 instrument present – and you're going to see in some instances
11 that there are because here we had the initial set, and that's
12 why I mentioned earlier about kind of the history of each of
13 these assets, they all tend to follow the same model. Where
14 you have those original direct placements, you have those
15 original sets of agreements, as you did in *Telegram* and as you
16 did in *Terraform*.

17 And then what happens is when the blockchain launches
18 and the network develops and then it expands, you then have
19 people in the retail sense buying into – and that's why I said
20 before buying into this enterprise. And so the way Judge
21 Rakoff and Judge Castel looked at it is they said if you take
22 the instrument and you take the full set of expectations and
23 understandings that go with it, that is what constitutes the
24 scheme or the transaction here. And Judge Castel was keen to
25 note that "scheme" is not anything nefarious or pejorative;

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1 it's descriptive because it looks at the totality of the
2 inducements.

3 Now, are we saying that a contract can never exist?
4 No, we're not. In fact, there are a number of digital token
5 transactions that take place, not just in this case as it did
6 initially, but just as a general matter. What we're saying is
7 that a contract is not dispositive, that you can have the full
8 set of expectations and understandings that embody the
9 inducements. Now, in terms of that, I did want to point out,
10 though, on Coinbase's changing standard here, with the
11 impression of a contractual undertaking. Because I think that
12 Judge Castel got to this in *Telegram* because Judge Castel had
13 said that when the defendants launched this blockchain and then
14 continued to publicly disseminate their plans to continue
15 expanding and supporting it, they had an implied obligation to
16 continue to do that.

17 I think that's what Coinbase might be getting at here.
18 They might be invoking Judge Castel's standard. And if that's
19 what they're doing, then our complaint satisfies that standard,
20 your Honor, because you have in these instances an impression
21 of that undertaking. I mean, if you look at an impression,
22 it's something that I will think of when I see, hear, or read
23 something.

24 And you look at purchasers on Coinbase's platform when
25 they see, hear, and read all about these issuers – and they can

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1 do that easily because, as we allege in the complaint, Coinbase
2 links to that information correctly, or the purchaser can read
3 about it on their own. But when they look at all of this
4 information, what do they see, read, and hear at the end of the
5 day? They see, read, and hear that this is an investment
6 opportunity, an opportunity to acquire a token as an investment
7 into this network. And so if you add that up, the totality of
8 the inducements in that sense, that is what makes this an
9 investment contract transaction.

10 THE COURT: Once again, I presume you're going to say
11 based on earlier discussions that in isolating or selecting the
12 12 or 13 tokens that you have, you specifically looked at
13 tokens for which there is this back story, this suggestion of
14 both origination and then development such that any purchaser
15 of such an asset either looking at or having the ability to
16 look at this narrative of growth, development, and hopefully
17 increase in the value of the tokens. Is that your argument to
18 me on that point?

19 MR. COSTELLO: Yes, your Honor.

20 THE COURT: In Coinbase's briefing, they make the
21 point that the assets that they list – and you'll excuse me,
22 this may be in the answer, it may not be in their briefing –
23 but they talk about the approval process that they have, the
24 digital asset support group and how that winnows away certain
25 assets that were then not included on the platform. But what

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1 they say is that the assets that are listed – and I imagine by
2 extension, therefore, the 12 or 13 you've identified – involve
3 no continuing promises from the issuer or developer to the
4 token holder, impose no post-sale obligations on the issuer or
5 developer, and involve no profit sharing between the issuer or
6 developer and the holders.

7 First of all, as a factual statement, do you dispute
8 what they've said? I guess my question is do you agree and say
9 it doesn't matter because of what you and I were just talking
10 about? Or do you disagree and say it's a factual issue that I
11 won't be able to consider until the summary judgment motion?

12 MR. COSTELLO: No, your Honor, we've not saying that.

13 We agree that sure, our complaint doesn't allege that
14 there are contracts between the purchasers on this platform and
15 the developers or the project team, sure. And we contend that
16 the purchasers in these tokens are not getting a share of the
17 ecosystem in the form of a distribution or a dividend, sure.

18 But the point is those aren't requirements under
19 *Howey*. Those are just added ingredient that Coinbase has
20 decided to amend the *Howey* test with. So the reason we don't
21 plead that is because that's not part of the test. And as we
22 talked about with the contract side of it, this question about
23 contractual obligations and how you want to characterize it and
24 everything else, that's a question of state law. That has
25 nothing to do with whether a security is formed.

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1 And on this other thing about acquiring a share of the
2 business, you know, getting a dividend or a distribution of
3 some kind, Justice O'Connor, I thought disposed of this in
4 *Edwards* a couple of years ago where she had said that when
5 *Howey* uses the term "profits," it's not limited to the profits
6 of the scheme in which someone invests. It can also include an
7 appreciation or a gain. In other words, it's the return that
8 someone expects in order to participate in something like this.

9 When you have an investment contract, somebody is
10 giving over their money, they're parting with their capital,
11 their cash, to participate in this venture, and they expect a
12 return on that. They expect at the end of the day that they're
13 going to get more money back. And they can do that either by a
14 distribution or a dividend or, as Justice O'Connor was getting
15 at, a gain.

16 It's similar to stock in that sense, your Honor, in
17 the sense that a stock can generate a return in the form of
18 dividends, assuming that the corporation decides to pay
19 dividends – the board might vote not to, but most of the time
20 they do. Or a more popular way to get a return on stock is to
21 sell it at a gain, and that's exactly what's happening with
22 these tokens. People buy these tokens hoping, as we saw before
23 with the Chiliz issuers talking about demand is going to
24 explode. So people want to buy these because they look at what
25 the issuers and the project teams are planning, and they think

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1 this is a value proposition.

2 So they can buy this token, this computer code, and
3 then they can wait until the value of the ecosystem increases
4 based on this. They're relying on these inducements. And then
5 when it does, they can sell it on Coinbase's platform to
6 someone else and realize a gain on it. That's what *Howey*
7 requires.

8 THE COURT: But again, looking at either the limits of
9 or the logical extension of your arguments, I am presented with
10 the specter of collectibles being regulated by the securities
11 industry. And I'm not minimizing. I've not thought about
12 Beanie Babies in decades, and yet it's been presented to me in
13 multiple briefs, and that's fine. But lest I be confronted
14 with a class action about Beanie Babies, you were, I think,
15 suggesting to me a moment ago what the limits are. So I want
16 to understand how your standard that you've just articulated to
17 me does not sweep in collectible markets or commodities, which
18 is my bigger issue. So I think you were suggesting that it was
19 sort of the collective undertaking, but let me understand that.
20 Because it is a real fear that I have that your argument is
21 just sweeping too broadly.

22 MR. COSTELLO: Sure, your Honor.

23 And first of all, we are not contending that
24 collectibles are securities. So I'll just get that out of the
25 way.

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1 THE COURT: To be clear, no one is actually suggesting
2 that you are. We're all just afraid that you have so little
3 limitation on your standard that some really thoughtful
4 attorney is going to bring the Beanie Baby class action, so
5 that's what I'm saying, recognizing that even now you could
6 foreswear it right here, that doesn't matter. I care about how
7 I know that your test isn't going to implicate either
8 collectibles or commodities.

9 MR. COSTELLO: So easiest way to look at this is when
10 you are buying a collectible, let's say a baseball card or a
11 figurine of some kind, you're just buying the item. You are
12 buying a thing. You are not buying into something. And that,
13 I think, is the difference. There is no enterprise that is
14 involved in this. You know, if you buy a baseball card, for
15 example, you're not buying into the baseball card player
16 enterprise, right? And other people are not also buying into
17 an enterprise because that's what the common enterprise
18 requires. You're just buying an item, and you're hoping that
19 it appreciates. That is not a securities transaction. There
20 is a difference.

21 And also, when you're talking about collectibles in
22 particular, collectibles have their own value. There is no way
23 for somebody to make a basic card more valuable. It can't be
24 done. You know, the value of that baseball card is going to
25 depend on customer tastes and passage of time and what have

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1 you, but there's no way to make that more valuable in that
2 sense.

3 THE COURT: I would have thought, for example, in
4 certain collectibles I would've thought that akin to the
5 burning that one has in crypto assets, you can have a limited
6 edition figurine or you could do something to limit the
7 distribution of something and that would increase its value.
8 So --

9 MR. COSTELLO: Sure, your Honor.

10 There is that possibility, but again, I come back to
11 this concept of this buying into something. You're not buying
12 into an enterprise. In order for something to pass the *Howey*
13 test, in order for it to be a security transaction, you have to
14 have all three elements; it's not just one and three. So it's
15 not just buying something and expecting it to go up. There has
16 to be this notion of the enterprise.

17 Now, what is the enterprise here? What is
18 distinguishing these 13 tokens from a collectible? The fact is
19 the enterprise, and what is the enterprise? It's the network.
20 It's the ecosystem. You are buying into that ecosystem with
21 your token. The token is the key that gets you into this
22 ecosystem. Without the token, you can't get in. The token
23 would be worthless without the ecosystem; it depends on it.

24 And so when you have this collectible, you're not
25 buying into the collectible. You're not buying into the

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1 enterprise because there's nothing around it. Not to mention
2 that there's no commonality there, your Honor, in the sense
3 that under *Howey*, you have to have multiple people doing this
4 together who are all going to rise and fall together.

5 THE COURT: I'm just wondering if there are
6 collectibles for which there is a group of people who are
7 working together to ensure that there is a value. You don't
8 want to dilute the brand, as it were. But I suppose that's
9 beyond our discussions today.

10 Just one moment, please. Sir. I think I've talked to
11 you or your colleague about the Securities Law Scholars, so I
12 don't think I'll discuss that with you further.

13 Did I understand your standard of the common
14 enterprise to be one of parting with capital with the
15 expectation of profit? Or is that just part of the analysis?

16 MR. COSTELLO: Well, that would be the first prong of
17 *Howey* and the third prong. The second prong is the common
18 enterprise.

19 THE COURT: Okay. And I have to have all of them
20 together?

21 MR. COSTELLO: Correct.

22 THE COURT: When you're discussing the *Wals* case and
23 the *Lauer* case, you suggest that because of the marketing of
24 assets to unsophisticated investors, a Court might find on
25 those facts that an investment contract exists without

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1 requiring ongoing obligations. I guess I have a slightly
2 broader question than that, which is to what extent today are
3 you asking me to make a determination about the sophistication
4 or not about crypto asset purchasers, and does it enter the
5 calculus at all for me?

6 Let's step back a moment. To the extent you want to
7 tell me SEC charged with protecting investors, really
8 important, I get that. But what I'm really saying is is my
9 analysis of whether these assets are securities or not impacted
10 by the sophistication or not of the investors, and could I even
11 make a determination if it were?

12 MR. COSTELLO: I don't know that sophistication really
13 is the issue, your Honor. The issue is, sure, I mean, that's
14 what our mission is is to protect investors through disclosure.
15 But in terms of whether or not a securities transaction is
16 present, it doesn't matter the level of sophistication of these
17 people who are buying these tokens, because the *Howey* test is
18 going to be the same no matter what. In other words, I think
19 what I mentioned before where we part issue, respectfully, with
20 Judge Torres' view in *Ripple*, there's no need to create two
21 different categories of people at the end of the day. Because
22 whether you're sophisticated or no not, you're still buying the
23 same token.

24 THE COURT: Sir, turning to the issue of the
25 reasonable expectation of profits, this is going to be a little

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1 bit repetitive, but it's more to confirm for myself the
2 questions I had earlier have been asked. When you're speaking
3 about the reasonable expectation of profits from a third
4 party's efforts, the third party here are the issuers and
5 developers of the crypto asset and not Coinbase?

6 MR. COSTELLO: Correct, your Honor.

7 THE COURT: Okay. I'm now going back. When we had
8 our first conference, someone at the front table emphasized in
9 a happy way the fact that this was just a consequence of the
10 strict liability of the '33 Act in certain respects, which may
11 be correct, but also may be a little troubling for me. And I
12 was trying to figure out what it was that brought Coinbase into
13 your crosshairs. And I suppose the real issue is that what it
14 did was it placed on its platform tokens where the issuers of
15 the token were developing an ecosystem and had big plans for
16 advancing the value of the token.

17 So you're not suggesting that Coinbase acted with any
18 bad intent or did themselves anything to enhance the values of
19 the tokens, unless you are. I thought your point is by making
20 them available for trading on a spot exchange through Prime,
21 somebody at your table would argue through Wallet, that that's
22 all they had to do. It's nice that they sought investors, it's
23 nice that they touted or at least provided information about
24 these securities, but simply having them on their platform is
25 enough from your perspective, yes?

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1 MR. COSTELLO: Yes, it is.

2 THE COURT: Okay. Because see, the thing about
3 *Terraform* and the thing about *Ripple*. I mean *Terraform*, Judge
4 Rakoff is, of course, brilliant, but the decision is *Terraform*
5 was not a shock to me when you look at the way he describes
6 what was going on in that case. The difference here is we're
7 not talking about the issuer of the crypto asset. We're
8 talking about an entity that put it on their platform. That to
9 me is a level removed from *Terraform*. It's a level removed
10 from Judge Castel's case. It's a level removed from Judge
11 Barbadoro's case.

12 And that's the concern I have about how these entities
13 should have known — and you or your colleague saying "strict
14 liability" doesn't make me feel better about it — how folks
15 should know that they weren't implicating the securities laws.
16 So I'm just confirming at a minimum, the conduct was placing on
17 the platform stuff that you now tell me amounts to a security.

18 MR. COSTELLO: Yes. The short answer is yes, your
19 Honor. We're not alleging fraud or anything like that. This
20 is just a strict liability in that sense.

21 But I do want to back up because there's another part
22 to your Honor's question that concerns about, well, you know,
23 all of a sudden here's the SEC and applying *Howey* and now
24 contends there were securities transactions. That's not quite
25 the whole story.

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1 The SEC has been clear for a very long time that *Howey*
2 is what determines whether something is trading as an
3 investment contract. And we had been clear about that, that it
4 doesn't matter in what context it trades, whether it trades in
5 an issuer transaction or secondarily. If you go back to 2017
6 when we first released the DAO Report, we were very clear in
7 that report we were cautioning secondary trading platforms that
8 if they are intermediating securities transactions, then they
9 have to register.

10 And that carries through into 2019 where the SEC staff
11 released additional guidance. This is the information that we
12 allege in our complaint and that Coinbase admits being familiar
13 with in its answer. So we've been clear about that. And not
14 only that, your Honor, but Coinbase itself, at least according
15 to our complaint at least purported to do a *Howey* type analysis
16 on its own when it came to the listing process for these crypto
17 tokens. And they had a rather – what at least purported to
18 be – somewhat comprehensive application.

19 So when an issuer wants to list on there, the
20 application requires the issuer to provide information about
21 its founders, its project team, its allocation of tokens to the
22 founders and the project team, its plans, its promotions, its
23 accounts, its plans to encourage scarcity to burn the tokens.
24 In other words, their listing application that they, I guess,
25 reviewed, after they were done looking at it, is exactly the

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1 type of information that appears in our complaint.

2 And we have looked at the very same information that
3 they claim, I guess, to have looked at. We reached one
4 conclusion, and they appear to have reached another conclusion,
5 which I suppose is a long way of saying that, given that you
6 can have two parties applying the very same standards looking
7 at the very same facts and coming to the same very different
8 conclusions, I think is all the more reason why this motion
9 should be denied just for that reason alone. But for there to
10 be an argument that neither Coinbase nor the market was on
11 notice of any of this, that's just not true.

12 THE COURT: I do want to turn to the major questions
13 doctrine in a moment, and then we'll have a break. And then
14 we'll have probably just as much questioning for the folks at
15 the back table. They can rest up for it. But I would like you
16 to comment on one thing, and I know you have in different ways,
17 but, again, it's just going to give me the clarity that I need
18 for this decision. In one of the amicus briefs, the one that
19 O'Melveny did – I think that's Andreessen Horowitz – there's an
20 argument that your standard converts the requirement of
21 reasonable profit expectations from the efforts of others into
22 a free-floating expectation of profits, even if the expectation
23 is not enforceable, not reasonably believed to be enforceable,
24 or not tied to the actions of the developer, promoter itself.

25 Do you agree with each of those?

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1 MR. COSTELLO: No, your Honor.

2 I think that what that party is doing is just
3 restating Coinbase's arguments, but in a different way. I
4 think, as we talked about before --

5 THE COURT: The impression argument?

6 MR. COSTELLO: It's the impression argument, but it's
7 the larger point on contracts. I think what you see in some of
8 these briefs is that this requirement of a contract is not how
9 an investment contract is formed under the law. *Howey* is how
10 it's formed. And whether or not it's enforceable is not a
11 securities law question; that is a stake question of some kind.

12 And on this question of turning this free-floating
13 thing into issuers and everything else, well, that's where the
14 inducements come from in this case. They come from the issuers
15 of these tokens. They come from their project teams. And as
16 we saw looking at one of the examples earlier, I think it's
17 pretty clear what impression these issuers are trying to give.
18 And if you look at how the allocation of tokens played out
19 initially, these issuers and project teams allocated the tokens
20 to themselves. I mean, it really doesn't take a leap to figure
21 out why that could be.

22 So when you look at the impression, to use Coinbase's
23 term, that these issuers are giving, the impression is this is
24 a value proposition. This is an investment opportunity. So we
25 take issue, I think, with some of the characterizations in the

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1 briefs.

2 THE COURT: Mr. Tenreiro, thank you very much for your
3 patience, sir. Before I became a judge, I was quizzed by
4 Senator Schumer, and one of the things he was getting at,
5 although I'm not sure I'm supposed to disclose this here, is
6 that he wanted to be sure that I was not going to be an
7 activist judge, however he defined that. And I'm not going to
8 name the names of the judges in this and other districts that
9 he's identifying as activist judges. I'll leave that for you
10 all to ruminate on.

11 But the larger point for me is that I recognize that I
12 have a lane that I should be staying in. And there's a lane
13 that you all are in, and there's a lane that Congress is in.
14 And I actually have received a brief from a sitting United
15 States senator involved in this space who says to me, "Don't do
16 this, Failla." I have to give that some deference, don't I? I
17 mean, why is she wrong?

18 MS. TENREIRO: Thank you, your Honor.

19 I think that the reason we have to be careful there,
20 because I think that the *Howey* test was specifically enacted
21 with the Congressional intent in mind – that's what the Supreme
22 Court said when they said, well, contract and define investment
23 contract, what were they thinking? And so I think she's wrong,
24 respectfully, to Senator Lummis, because one senator's view
25 cannot override that Congress' will from 1934. So when I

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1 became a law student, I read Justice Scalia's book, and he
2 didn't like legislative history because he said it's become a
3 game. And the senator put something in the legislative history
4 and says, "Oh, this is what this means," because he knows that,
5 respectfully, Judge Failla is going to look at it.

6 THE COURT: He wasn't wrong.

7 MS. TENREIRO: That's right.

8 The major questions doctrine is there to make sure
9 everyone stays in their lane. And by perming one senator to
10 say something, say, "I disagree with the SEC," I think that
11 would create really more than just separation of powers
12 concerns but really structural concerns.

13 THE COURT: But she's not just random senator. She's
14 someone who is deeply involved in the space and is herself a
15 cosponsor of legislation to implement the regulations or to
16 implement a structure that she says is not found in the *Howey*
17 test, and it doesn't cover this specific group or type of
18 assets. Why is she wrong?

19 MS. TENREIRO: And respectfully, your Honor, I
20 certainly --

21 THE COURT: By the way, you guys can stop saying
22 "respectfully." I always wonder what that means. I actually
23 interpret that as an insult. I'll accept that you'll all be
24 respectful of whoever you're maligning in your answer.

25 MS. TENREIRO: The press might not, your Honor.

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1 So take a step back. Certainly one of the factors
2 that the Supreme Court has looked at in major questions
3 doctrine is Congressional action or what Congress has
4 considered. There's one case in which Chief Justice Roberts
5 quotes Speaker Pelosi. I'm certainly not saying that the Court
6 completely ignores what Senator Lummis or others are saying.
7 I'm simply saying that it cannot be that a senator or even a
8 group of them have the authority to sort of overrule or repeal
9 what a Congress duly enacted, presented to the president for
10 signature in 1934. That could create all sorts of issues with
11 all sorts of laws where --

12 THE COURT: Sure. But they're not saying they're
13 overruling or repealing it. They're saying we've had a great
14 run. We've had 90 years for which these securities laws have
15 been able to cover all manner of instruments, and now we've got
16 something different. And these are instruments that I'm not
17 saying they were designed to evade the securities laws, but
18 they're just differently qualitatively than other instruments.
19 And so the argument is we're not sure whether they're
20 securities, we're not sure whether they're commodities, we're
21 not sure who should have custody of them. But I don't know
22 that this is necessarily a repeal as much as it is a filling of
23 the void as to a particular category of instruments.

24 MS. TENREIRO: Well, we simply don't agree. And that
25 sort of does, I think, expose a little bit of a circularity of

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1 Coinbase invoking the major questions doctrine here. In any
2 event, if it's not a filling of the void because the *Howey* test
3 gives you the answer in either direction – and we think it's
4 the direction that Mr. Costello explained – then you're not
5 filling the void. You're simply applying the *Howey* test, which
6 again was constructed specifically with the Congressional
7 intent in mind.

8 That's what's so interesting about trying to apply
9 major questions to the *Howey* test. The Court said congress
10 wanted it to be flexible, and there's a line in, I think,
11 *Joiner* where the Court said Congress specifically crafted these
12 statutes to capture the countless ways in which people might
13 think to raise funds for their projects. I'm now giving a more
14 abbreviated version of the *Howey* test than Mr. Costello did,
15 but the point is that's what Congress wanted to do.

16 And so applying the *Howey* test to new types of
17 investment schemes, investment products, is in fact nothing
18 new, to be a little circular. The Courts have been applying
19 the -- the case where there were cattle embryos. I don't know
20 if payphones existed in 1933, but let's assume they did. There
21 are Court of Appeals cases about what were called AdPacks on
22 the internet in the Tenth Circuit, and there's the SG Limited
23 case in the first circuit.

24 So courts have been applying the *Howey* test, the
25 flexible *Howey* test to these investment schemes for decades.

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1 And that has, by the way, not resulted in people bringing the
2 Beanie Babies lawsuit. But more importantly, courts have been
3 doing that because they thought that in doing so they were
4 effecting the congressional purpose. And so that's it.

5 THE COURT: That was abrupt.

6 There's a dispute, I would say, between Coinbase and
7 some of the amici about the significance of the crypto asset
8 industry when compared with something like the energy industry
9 or student loan debt forgiveness. I don't know that the
10 commission really spoke to that, and if you want to speak to
11 that, please do so now.

12 MS. TENREIRO: Yes, your Honor.

13 So it's important to contextualize the size. So
14 there's a number of major questions cases, right? Some of them
15 have used --

16 THE COURT: I didn't think there were that many, but
17 go ahead.

18 MS. TENREIRO: Somewhere between five and eight,
19 depending on how you count them.

20 THE COURT: Hardly "a number," but yes, go ahead.

21 MS. TENREIRO: And so in the cases where the Court
22 looks at the size or the economic significance, there's a
23 number of ways in which the Court does it. One is the cost of
24 compliance, and I think that's the landlords' case, the *Alabama*
25 *Realtors* case. They look at the cost of compliance. In other

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1 cases they look at the expansion of the agency's scope. In the
2 *Utility Air* case, they say in one category you had 800 permits
3 and now you're going to have 2,000, and you're going to
4 increase the cost of compliance from 62 million to 21 billion.

5 In other cases, the Supreme Court looks at sort of the
6 totality of the American economy, and they'll say – in the
7 evictions case, they'll say 80 percent of the country might be
8 affected. And in the student loan case they say 98 percent of
9 borrowers might be affected, and we're talking about
10 500 billion in student loan debt versus 1.3 trillion in
11 spending.

12 So I'm giving that as context to my answer, which is
13 no matter which of these sort of versions of the economic
14 significance factor one applies, with all due respect to the
15 crypto industry, it does not meet that version. So there's a
16 number of ways to look at it.

17 So first of all, they're playing a little fast and
18 loose with the number because they say, well, it's 1 trillion,
19 but that's really a global number. And I haven't seen that in
20 these five or eight cases, right, we're looking at the American
21 economy. They're saying that 1 trillion includes Bitcoin,
22 which is not at issue here and is a significant portion of
23 these markets. So already there they're giving the wrong
24 number, in our estimation.

25 And then they're not comparing it to the right number.

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1 The commission regulates the 100-plus-trillion capital markets
2 in the United States. The size of the global capital markets
3 is north of \$400 trillion. And so when one looks at that,
4 again, I'm going to say it with due respect to the crypto
5 industry, they're a rounding error in that sense, right?
6 1 trillion is a rounding error when it comes to the global size
7 of the global capital markets.

8 And so for this quote/unquote "new asset class" to be
9 somehow swept in – and of course that's not what we're doing
10 here, right? But even accepting that premise would not
11 constitute a significant expansion of the commission's
12 jurisdiction over the capital markets.

13 (Continued on next page)

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1 So that's the context in which I think we these to look at the
2 one trillion number that they offer.

3 THE COURT: Thank you very much. Just one moment
4 while I see if I have additional questions for you. Sir, bound
5 up in the major questions doctrine or sort of adjacent to the
6 major questions doctrine is this idea of SEC is violating
7 Coinbase's due process rights. Are you the person to speak to
8 that issue, other than to just say, no, we're not? Or is there
9 someone else at your table who wants to just briefly address
10 that issue?

11 MR. TENREIRO: Your Honor, I think Mr. Costello
12 addressed it already in some ways, but I'll try to repeat. We
13 are not -- so if it's a fair notice argument, that's the due
14 process argument, I think, and we are not violating Coinbase's
15 due process rights or violating fair notice principles. The
16 courts have been clear that if we apply *Howey*, that's the
17 notice you need. Judge Dearie in Brooklyn said it in 2018 that
18 if anything were needed to issue the DAO report, that sort of
19 made clear the commission's position. And what fair notice and
20 due process require is that the party know, the regulated
21 party, particularly in the context of civil regulation, that
22 the party know the test that is going to be applied, not the
23 outcome.

24 THE COURT: Okay. Thank you very much. Let me do
25 this because I tend not to look at time until my deputy tells

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1 me to look at the time. We've been two hours at this, and it's
2 been very productive. I imagine we'll have the same with the
3 back table, at least, the 90 minutes to the two-hour mark.
4 I'll take a break of 15 minutes. If folks had plans to break
5 for lunch, and I mean really the folks at the front two tables.
6 I'm sorry. I don't care about the rest of you in the gallery,
7 but if folks have plans, I didn't think you did, tell me and
8 I'll see what I can do. But my plan was to go and finish
9 questions for the folks at the back table, and then allow each
10 side very brief summation in the sense of anything they wanted
11 to tell me but I didn't ask a question about. That's my plan.
12 If you guys had different thoughts, talk to each other and talk
13 to me in about 15 minutes.

14 I'll see you then. Thank you very much.

15 (Recess)

16 THE COURT: Thank you very much. Please be seated.
17 And thanks to those of you who remained who are foregoing your
18 lunch for this event. Much appreciated.

19 All right. Mr. Savitt, I believe I'm talking to you,
20 sir. Can I begin, please, with some of the preliminary
21 questions that I had for the commission? I believe you have a
22 different view, sir, as to the degree to which I can take
23 judicial notice of your factual statements and of the factual
24 statements in the amicus briefs. But may I hear from you on
25 that, please?

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1 MR. SAVITT: Yes, your Honor. Thank you. We agree
2 with the commission that the materials both before the Court
3 and the posture of this motion are substantially similar to
4 what they would be in the context of the Rule 12(b)(6) motion.
5 Of course, the well-pleaded allegations in the complaint are
6 before the Court as are all matters properly before the Court
7 of judicial notice and all documents incorporated by reference
8 in the complaint. To the extent there are public statements
9 of the SEC, officers of the SEC, those we believe are properly
10 before the Court as a matter of judicial notice.

11 To the extent the litigation involves legislative
12 proposals that are a matter of public record, they, too, we
13 believe are before the Court as a matter of judicial notice.
14 We think public filings are before the Court as a matter of
15 judicial notice. We think the S1 filing of Coinbase is before
16 the Court.

17 THE COURT: Two things, sir, please excuse me. First
18 of all, for reasons known only in my courtroom, your microphone
19 is not as strong as others. Can you bring it a little bit
20 closer to you because I want to make sure we hear you. Trust
21 me, it's not you. It's the microphone. So I can take better
22 notes, if I could ask you to speak a little bit slower. Go
23 ahead.

24 MR. SAVITT: Of course, your Honor. Apologies.

25 We think SEC filings are a matter of public record and

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1 properly before the Court accordingly as a matter of judicial
2 notice that includes Coinbase's S1 filing. The Court has seen
3 the discussion of Chair Gensler's remarks. We think they are
4 properly before the Court. There are a number of documents
5 incorporated by reference into the complaint including
6 Coinbase's user agreement. Those are properly before the
7 Court. To the extent the complaint makes reference to what
8 appears on Coinbase's website in connection with its
9 allegations, those are properly before the Court.

10 So we agree that this is a pleadings motion, and it's
11 governed by all of the rules that govern what's before the
12 Court in the pleadings motion. But there is a quantum of
13 matters that the Court, we think, can take properly take notice
14 of cognizance of as a matter of judicial notice or the
15 incorporation principle.

16 THE COURT: And so from your perspective, sir,
17 everything in the first 33 pages fits into one of the
18 categories that you've just articulated for me, and I can
19 therefore articulate all the factual statements that are
20 contained in the first 33 pages -- I believe it's 33 pages --
21 of your answer?

22 MR. SAVITT: I do not agree with that, your Honor.

23 THE COURT: Oh, okay.

24 MR. SAVITT: What I can't do is catalog for you what's
25 in and what's out off the top of my head.

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1 THE COURT: Okay. You are saying you are admitting
2 the possibility that there are some things in the answer that
3 are interesting but I can't consider.

4 MR. SAVITT: We agree with that. Properly before the
5 Court are the plaintiff's pleadings, the well-pleaded
6 allegations of the complaint, matters of judicial notice,
7 matters that are incorporated by reference. You had a colloquy
8 with my friends at the front table about whether certain
9 matters that were in briefs by law scholars and the like were
10 properly before the Court. That's an interesting question, and
11 I think the answer to that would be yes because they do not
12 seem to be to us matters of factual dispute. Even in the
13 motion to dismiss, the Court is permitted and I think expected
14 to take account of what is happening in the world, and the
15 contents of scholarship and facts that are not truly matters
16 that are disputed in the litigation. The background of an
17 industry, for example, I think that's common, appropriate and a
18 matter of judicial notice. So we wouldn't exclude those
19 matters, but we wouldn't say that every factual allegation in
20 our answer is before the Court.

21 THE COURT: Much appreciated. With respect, for
22 example, to the scholars, we have two sets of scholars.
23 There's sort of the state law, blue sky law scholars and then
24 the admin law scholars. I suppose the answer is that I could
25 look at those same cases myself and come to the same

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1 conclusions. So rather than think of it as giving me facts
2 that I must accept or reject, they are pointing me in the way
3 of cases that say or don't say what they are represented to
4 say. But I appreciate your thoughts on that.

5 Again, sir, some of these questions were specific to
6 the commission because they are the ones bringing the
7 complaint. But I would like to understand from your
8 perspective whether to focus -- I should be focused solely on
9 the secondary market here. There was some discussion with the
10 SEC about AssetHub and what it does or does not do. But I'm
11 assuming that, particularly given the nature of the arguments
12 you are making me to me under the *Howey* test, that my focus is
13 on the secondary market; is that your understanding as well?

14 MR. SAVITT: It is, your Honor. We think we
15 understand the allegations of the complaint insofar as the
16 investment contract issue, the *Howey* test issue is concerned,
17 to relate to the trading of twelve tokens on Coinbase's
18 secondary market, either the prime platform or the spot market,
19 which are all blind bid ask transactions. And we believe that
20 those are the only transactions that are properly before the
21 Court.

22 There is, as the Court noted, a passing reference in
23 paragraph 65 of the complaint to AssetHub. That's the only
24 fact in this lengthy complaint that even references primary
25 sales. That allegation references Coinbase's website. We

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1 think that is properly before the Court, and if you click
2 through to the website, you will see there that that is not a
3 source through which issuers can sell tokens. It supplies no
4 basis for the Court to consider or for the plaintiff to put
5 before the Court the issue of primary trading. There isn't
6 anything here that relates to primary trading at all. This
7 case is about secondary trades on the spot market and the prime
8 market between strangers.

9 THE COURT: Let me ask you this. I thought I
10 understood Coinbase's submissions to say to me that the assets,
11 these tokens, are not securities in the first instance. And
12 therefore, by extension, secondary transactions in things that
13 are not securities are not themselves transactions involving
14 securities. Was that, in fact, the argument that Coinbase was
15 making, or is Coinbase arguing that these assets may in some
16 circumstances be securities but that the particular
17 transactions that one can have on the spot market, on prime,
18 through wallet, through staking, that those are simply outside
19 of the purview of the securities laws?

20 MR. SAVITT: Your Honor, let me try to answer the
21 question this way. We are skeptical that crypto tokens, that's
22 these digital assets can themselves be securities in any
23 scenario. And while I listened with care to your conversation
24 with the commission earlier today, I believe that's where they
25 ended up, too, that the tokens themselves are not securities.

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1 And I think that is common ground, and I think that would be
2 our position.

3 That's a different matter, though, your Honor, and I
4 wouldn't want to be heard to overstate our position as to
5 whether transactions in these tokens can be on the primary or
6 secondary market in some set of circumstances investment
7 contracts and therefore securities. We do contend with force
8 that the tokens that trade on Coinbase's secondary market that
9 are before the Court in the complaint are not as a matter of
10 law investment contracts and therefore not securities.

11 THE COURT: I really appreciate the clarification that
12 you were just giving me, because I thought it would have been
13 easier to say they are not securities, they can never be
14 securities, and therefore, any transaction involving them could
15 not be a security. I understand you now to be saying that
16 there is a possibility. Well, that the assets themselves are
17 not -- are not -- in and of themselves securities, that there
18 are perhaps theoretical possibilities where transactions
19 involving those assets securities could be investment
20 contracts, but that the particular transactions at issue in
21 this case as described by the commission do not implicate the
22 securities laws. That's your argument?

23 MR. SAVITT: That's our position, your Honor.

24 THE COURT: I appreciate understanding that better
25 that I did when this began, so thank you for that.

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1 If the assets, these crypto assets, are not themselves
2 securities; they're tokens. Why does one buy them? And
3 according to the commission one of the reasons that one buys
4 them is that they might appreciate in value. There are other
5 reasons to be sure, but one of the allegations in the complaint
6 is that they are being bought with the theory that there's some
7 value to them or perhaps some value in transactions involving
8 them such that they would appreciate in value. But why does
9 one buy a token?

10 MR. SAVITT: I am not sure that I want to give the
11 devil its due, but I want to give the commission its due.

12 THE COURT: Okay.

13 MR. SAVITT: We do not contend that there are
14 inadequate allegations in this complaint to establish that some
15 tokens are traded on the Coinbase platform in the hope that
16 they'll appreciate. We're not saying that that's true, but for
17 a matter of pleadings, we understand that to be part of what
18 the front table is alleging. And no part of our defense on
19 this motion goes to that point. I appreciate that that was a
20 slightly indirect answer to your Honor's question.

21 THE COURT: Yes, I did notice that, too, but --

22 MR. SAVITT: I say it because I did want to make that
23 point clear. We want to join issue with the SEC on the actual
24 controversy here, and that's not what it is.

25 As to why people buy tokens, I should say at the risk

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1 of being crosswise with my client, I don't know. I've never
2 bought one. I think there are multiple reasons people buy
3 tokens. I think they can be purchased for investment. They
4 can be purchased for utility. They can be purchased to swap
5 and trade. I think there are any number of reasons. But
6 insofar as matters here, we will accept for purposes of the
7 pleadings that some trades will happen in Coinbase in these
8 twelve tokens on the secondary market in which one of the
9 objectives is investment gain.

10 THE COURT: All right. So you just said a moment ago,
11 you actually want to join with the commission on actual
12 arguments and not some of these more esoteric and theoretical
13 matters. So what are the arguments in which you join? Your
14 arguments are that these transactions alleged in the complaint
15 are not themselves investment contracts; not that there
16 couldn't be but that these aren't.

17 MR. SAVITT: That is our argument, your Honor. And as
18 I said a moment ago, we don't take the view that token
19 transactions on primary or even potentially on secondary
20 markets can never be an investment contract. I think we could
21 have a conversation in which we could imagine transactions that
22 could would look like investment contracts, but it requires
23 allegations of fact that are missing in this complaint. And to
24 be clear, what I -- we want to give the full perimeter to the
25 commission's position on its pleadings.

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1 We know that the Court will give every inference that
2 is reasonably drawn in their favor, so we want to give those
3 inferences. Because we think even with that perimeter, we have
4 arguments that should prevail, which is the point that I was
5 trying to make about not wanting to draw caricature of the
6 position on the other side but to give it its full berth.

7 THE COURT: Appreciated, thank you. According to the
8 commission then, as I look at these transactions in the
9 secondary market through services offered by Coinbase, I don't
10 just look at the purchase of the asset. I look at what the
11 purchaser is getting. And according to the commission, the
12 purchaser either is aware of could be aware that one of the
13 reasons that buying this token buys into the ecosystem, the
14 goals of the issuer, whether they be to build a better
15 blockchain or to develop apps for that blockchain or otherwise
16 promote whatever the blockchain is.

17 And so what they're suggesting is that by dint of
18 their being statements from promoters and developers and
19 issuers, and by dint of those statements being included on
20 Coinbase's platforms, that I can understand, at least 12(b)(6)
21 purposes, that a reason that customers are buying these tokens
22 is in order to advance the goals of the issuers to join that
23 common enterprise. Could you tell me, please, why they're
24 wrong?

25 MR. SAVITT: Well, I should say, I don't think all of

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1 that is wrong.

2 THE COURT: Okay.

3 MR. SAVITT: And here again, this is in the spirit of
4 trying to flush out the position of the other side.

5 THE COURT: Yes. I like to hear what you agree with
6 and what you disagree with. Thank you.

7 MR. SAVITT: We think so much is true, for purposes of
8 the pleadings only, it's alleged that there are circumstances
9 on the secondary platform in which buyers buy tokens with
10 knowledge of the statements of intent of promoters with respect
11 to the things they may hope to do on their blockchain or
12 otherwise with the token that they've issued. And that those
13 statements may well be in the understanding or consciousness of
14 a buyer when he, she or it purchases the tokens.

15 Whether that constitutes buying into an ecosystem is
16 something that I don't know that we believe is adequately
17 pleaded. I'm not quite sure what the phrase "buying into"
18 means, and we're at a point where distinctions like that might
19 matter. But we would acknowledge this. You have the purchase
20 of an asset, and what it's accompanied by are statements of
21 promotion, statements of intent by a promoter, which a buyer
22 might believe if they were followed through on, which they may
23 or may not be, could create a rise in the value of the
24 investment.

25 To that extent, we do agree with the SEC. We depart,

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1 of course, your Honor, on the question whether that is enough
2 in any reasonable conception of an investment contract, whether
3 looking at it as a matter of statutory construction given the
4 words of the statute itself and the sections of the statute in
5 which it appears or within the contemplation of the contract,
6 that could constitute an investment contract. We think the
7 answer there is no, there isn't enough.

8 THE COURT: All right. So I believe the commission is
9 suggesting, and I'm going to very much minimize and dumb down
10 their position, but they are suggesting, as you were just
11 saying to me, that the purchase of an asset with knowledge of
12 the statements of intent could lead one to believe that the
13 person is purchasing the asset as some sort of espousal of or
14 hope to continue whatever the statements of intent are. If
15 your token is going to change the world in some great way, I,
16 by buying your token, may say, I agree and I think you should
17 change the word in that way and I hope that you do and that of
18 that leads to an appreciation in the value.

19 For you, sir, for your team, that is not enough. I'm
20 saying what's missing, and you are going to say some
21 contractual, some ability to enforce. But I want to understand
22 what does that mean? I'm asking you to describe it at its most
23 basic level so that I understand it.

24 MR. SAVITT: Completely fair, your Honor, and
25 understood. There were incidents -- before getting to that,

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1 with apologies, your Honor said that the SEC's position
2 involved buying a product to advance the interests or the ideas
3 of the promoter and I hear that.

4 THE COURT: Let me be more specific because I don't
5 think I was complete. Because I think in so doing they are
6 doing a couple of things. They are, number one, joining the
7 common enterprise of that issuer, of that developer; and number
8 two, they are doing so with the hope that there will be some
9 gain in the form of token appreciation as a result of that
10 purchase. So for some reason I'm thinking about those folks
11 who pick the NCAA teams based on the color of the uniform or
12 something like that with no -- and I'm not saying I was those
13 people, but I'm not not saying that I was those people. But
14 I'm saying so you could pick a token because you think it
15 sounds really cool or because your friend has that token and
16 you want to be just like your friend. But I think what the
17 commission is arguing is there are purchasers through Coinbase
18 who are looking at a token, looking at the developers, looking
19 at what the issuer hopes to do, and aligning themselves with
20 that and thereby, they say, joining that enterprise.

21 I think or I thought that your position was that
22 there's an absence on the part of the purchaser some way of
23 enforcing that or getting something from that. And then that
24 is the problem, but I'll let you speak.

25 MR. SAVITT: Your Honor, that's exactly what it is.

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1 We say that -- our friends at the front table picked on us a
2 little bit on this, but we deserve it. It's the right question
3 to push on by the commission and the Court. What we say, and
4 we think this is truly faithful to the statute, truly faithful
5 to the securities laws and their purpose and truly faithful to
6 the cases is that what's required, at least at the minimum, is
7 the holding out of an offer that includes a statement meant to
8 convey to the offeree some sort of enforceable right. At a
9 minimum, that much is required as a securities law matter.

10 THE COURT: And so just to play dumb here, what does
11 that mean? I mean, I guess you heard me ask Mr. Costello
12 whether the logical extension of his argument was that
13 purchasers of those tokens suddenly got rights under the
14 securities laws. I'm asking you the converse. If I bought SOL
15 or one of these tokens, and it went belly up not just because
16 that's just the way the world is but because something bad that
17 happened by company managing, which, of course, I'm not saying
18 is actually happening, am I just out of luck? Am I limited to
19 common law contracted tort rights but just not rights under the
20 securities laws?

21 MR. SAVITT: Very much the latter, your Honor. That
22 is to say the purchaser of SOL in the Court's hypothetical
23 would have claims sounding in fraud were there a fraud, and
24 that may or may not be, conceal that claims having a contract.

25 THE COURT: Well, you just said to me there's no

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1 enforce -- we're talking about the situation where there is no
2 statement of enforceable right, which would suggest that there
3 is. What is the context then in this attenuated transaction
4 between the purchaser and the ultimate issuer of the asset?

5 MR. SAVITT: That's a great question, your Honor, and
6 I should be clear. Fraud, we don't have the contract problem.
7 It's a tort, as the Court knows, and the most natural place
8 where there might be a cause of action in that scenario if
9 there was fraud. And the Court has no doubt seen when its
10 reviewed the investment contract cases that some number of them
11 either declined to find investment contracts but say there
12 could be fraud claims or find fraud claims under common law in
13 addition to an investment contract. One would imagine a
14 scenario where there was some sort of contractual relationship
15 between a buyer of a token and a promoter that was not
16 sufficiently linked to the investment that it would constitute
17 an investment contract. They could have contractual
18 relationships otherwise that constitute an investment contract.
19 But the bottom line we would want to push on is that there as a
20 distinction between the securities laws and the law of contract
21 and the law of tort.

22 Mr. Costello made reference to the *Joiner* case
23 earlier, and it's an important one, I think. And it informs
24 much of our thinking and perhaps much of the commission's in
25 that case. There was a question whether there was a state law

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1 contract claim. And it's very interesting when one traces it
2 through the lower court decisions, and you see that what's
3 happening is a debate amongst the circuit court about whether
4 there's an implicit contract or an explicit one, and the
5 Supreme Court, as the Court saw, found it unnecessary to
6 resolve that question because what it found was that there was
7 a sufficient holding out of a contractual relationship that
8 satisfied the securities law test. So as to render the precise
9 state law contract question unnecessary for disposition, Judge
10 Boudin said something to the same effect of the *Rodriguez* case.

11 THE COURT: And it is that sufficient holding out of a
12 contract is what you find be missing of the transactions at
13 issue here?

14 MR. SAVITT: In candor, your Honor, that's a little
15 bit of an understatement.

16 THE COURT: Okay.

17 MR. SAVITT: We think the complaint is truly devoid of
18 anything that could plausibly amount to a promise that is
19 enforceable by an issuer to a secondary buyer on Coinbase's
20 platform. And I'll raise, and I hope it's helpful to raise it
21 at this point in our conversation a couple of cases that really
22 came to mind when you were chatting with Mr. Costello on
23 largely this subject. The *Rodriguez* and *De Luz* cases, those
24 are cases in which real estate developers undertook to sell
25 plots of land, made all sorts of promotional statements about

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1 what they were going to do. They were going to put electricity
2 in. They were going to build roads. There was going to be a
3 country club. There was going to be a meetinghouse. I don't
4 know what there was going to be, all sorts of stuff. There was
5 a thing called Rancho California in southern California -- and
6 this is the *De Luz* case -- and it was going to be great. And
7 the Disney World developments in Florida that were at issue in
8 *Rodriguez*, these are cases that are feeling a lot like the
9 argument that we're hearing here, your Honor.

10 There's a promoter. The promoter is making promises
11 that it's going to develop a real estate ecosystem. Those
12 promises were on their face not enforceable by the buyers, and
13 when the sales were made, and in retrospect the buyers were
14 aggrieved by their purchase. They sued under the securities
15 law and said it's an investment contract. The Court said no
16 investment contract, and the reason was that promotional
17 statements aren't enough. Even promises in the ether aren't
18 enough. There has to be sufficient undertaking of an
19 apparently legally enforceable character so as to give the
20 buyer a claim. That's what those cases said in what we think
21 are highly analogous circumstances.

22 And I don't think there's any surprise in that. It
23 is, to return to for instance principles, your Honor, the words
24 are investment contract. It ought not come as a surprise that
25 people looking for a contract, and that has always been the

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1 touchstone.

2 THE COURT: Sure. But then we've got the whole scheme
3 argument.

4 MR. SAVITT: Well, we do have the scheme argument,
5 your Honor, and that's what we thought we would be confronted
6 with when we came to visit with you in July.

7 THE COURT: And we weren't.

8 MR. SAVITT: And we weren't, and we think there's a
9 reason, your Honor. We demonstrated we think to a
10 fare-the-well that the only way to understand the word scheme
11 as it appears in *Howey*, and it has been echoed down now through
12 the generations, is part of the scheme of contracts, a series
13 of transactions and contractual undertakings that taken
14 together constitute a whole.

15 We were so confident we were going to be confronted
16 with that argument, we addressed it in our opening brief. It
17 was met with stunning silence. That argument went offstage,
18 left never to return. And we don't think it's in the case
19 anymore. And we certainly don't think it's a position defended
20 in the answering brief. I mean, we think the reason is clear.
21 It can't be. It's not what the blue sky cases taught what the
22 investment contract meant. It's not what *Howey* meant when it
23 brought in the blue sky cases, and it's not what has ever been
24 meant in the cases since then. Every one of which, your Honor,
25 every one of which -- putting aside at any rate the recent

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1 crypto enforceable blitz, every one of them has involved a
2 cognizable contractual undertaking. No exceptions.

3 Your Honor, that reminds me that I was remiss in
4 failing to ask you whether, notwithstanding the character of
5 argument we made, we could hand out some slides that we made
6 that you might want to talk about.

7 THE COURT: I'm sure someone stayed up through the
8 night putting them together, so please. I'm sure they are
9 wonderfully done, and I appreciate that, so yes, as long as
10 you're sharing with the folks at the front table.

11 MR. SAVITT: I was going to play the
12 someone-stayed-up-all-night card if it was necessary, your
13 Honor. We have a great team of lawyers that have been working
14 hard on this, so thank you for that recognition. It came to
15 mind because one of the slides in here, and the Court will look
16 at it or not.

17 THE COURT: I have it in front of me. Is there
18 something you wanted to point my attention to right now, sir?
19 It's fine for after you all leave and I have nothing to do.

20 MR. SAVITT: Since you asked, your Honor.

21 THE COURT: Yes, thank you.

22 MR. SAVITT: Since you asked, your Honor, page 2
23 relates to an issue that should be talked about. And the point
24 we would like to make as a first principles point is that
25 everything has always known that investment contracts have to

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1 have contracts. This is an excerpt from the SEC's brief of the
2 *Edwards* case that your Honor heard about this morning. They
3 talk very specifically about the meaning of these two words as
4 they appear in the 33 and 34 Act, and quite unsurprisingly,
5 they observed, the commission did, before it decided that it
6 wanted to expand its jurisdiction in respect of crypto that the
7 second word in the quoted term contract means an agreement
8 between two or more persons to do or forbear something. It
9 has never been the commission's submission before the crypto
10 cases that the a contractual undertaking was not required. And
11 the additional point that I'll call your attention to slide 6.

12 THE COURT: Just a moment, please. I'm still at slide
13 two. Thank you. I'm there now, sir, thank you.

14 MR. SAVITT: I'm sorry, your Honor. Knowing that time
15 and life is short we didn't want to belabor all of these cases.
16 But these appear to us to be the universe of controlling cases
17 in this Court, the Second Circuit and Supreme Court cases on
18 investment contracts and every one of them involved a
19 contractual undertaking to deliver future value. Every one of
20 them until the crypto cases. Of course, there hasn't been any
21 Circuit or Supreme Court authority on those matters.

22 THE COURT: Before we put this to the side, sir, are
23 there other slides you want to call to my attention at this
24 stage?

25 MR. SAVITT: Not at this stage.

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1 THE COURT: Okay. Thank you. I'll keep it nearby
2 just in case. Thank you. I want to back up. I know we should
3 be going forward but I'm moving backward. I had extensive
4 discussion with the commission about what conduct of Coinbase,
5 what it is your client actually did that brings them here
6 today. And part of the reason I was asking that question was
7 to figure out whether there were factual disputes that
8 foreclosed a motion to dismiss based on the conduct alleged or
9 whether everybody agreed on the conduct and they just disagreed
10 as to the legal import of that conduct.

11 I know from your submission, I know from the DeFi
12 folks' submission that there is some dispute about what is
13 actually involved with the wallet program or with the staking
14 program. But perhaps including that, are you accepting the
15 commission's allegations of Coinbase's conduct and saying that
16 they are nonetheless, insufficient based on the discussion
17 we've just been having to implicate the securities laws. Or
18 are you saying otherwise, that there is a dispute but it's
19 obvious from my read or my ability to read materials of which I
20 can take judicial notice or that are fairly implicated by the
21 pleadings, the complaint, that I can determine that your view
22 of Coinbase's conduct is correct?

23 MR. SAVITT: I think, your Honor, for purposes of this
24 motion only, we are accepting the allegations in the complaint
25 as true. I do hasten to add that they need to be well pleaded.

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1 And by that, I mean that they need to plead facts rather than
2 conclusions.

3 THE COURT: Well, of course, yes.

4 MR. SAVITT: And that if they rely on the document,
5 the Court can and should resort to that document to verify the
6 well-pleaded character of the complaint. But we've worked very
7 hard to accept the pleadings as true, and to create for the
8 Court a pure question of law in respect of the investment
9 contract issue, and I think as Mr. Schwartz will say as respect
10 of the wallet and staking issue as well.

11 THE COURT: Okay. Perhaps that's where these factual
12 discussions are going to be had with greater detail. I guess
13 I'm asking, and perhaps it's too much to ask of you right now.
14 As you're sitting here, are their factual disputes, are there
15 things that you are thinking to yourself the commission
16 completely got it wrong and if Failla would look at the
17 underlying documents, she'll realize they got it wrong?

18 To me, the disputes were most acute and pronounced in
19 the discussion of the wallet and staking programs. But if, for
20 example, in the other areas there's something that you want to
21 call to my attention, please tell me that now.

22 MR. SAVITT: I think the answer is no, your Honor. We
23 talked, for example, about paragraph 65 in the complaint, and
24 AssetHub and you have our position. And that's an example
25 where I think there needs to be at least a jot of critical

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1 scrutiny attended to the pleadings and what they actually put
2 before the Court.

3 I listened with great interest to your discussion with
4 Mr. Costello about the scarcity potential in commodities and
5 having failed to get a complete set of baseball cards many
6 times as a child, I can tell you that certain cards are always
7 withheld to create scarcity and value. Whether that's a fact
8 issue, I don't know. But we aren't going to accept, for
9 example, without a fight the idea that things like Beanie
10 Babies and Star Trek memorabilia aren't part of an ecosystem,
11 to use Mr. Costello's -- I think that's is fair ground to
12 debate and I don't think that's what the Court was alluding to
13 but we could join issue on stuff like that.

14 THE COURT: Yeah. No, I'm grateful that we're all not
15 taking the tangent of thinking about our favorite collectibles
16 and using those. But I appreciate that. Thank you.

17 Okay. Before I started resuming discussions of the
18 legal issues, I wanted to make sure I understood where the
19 parties agreed or disagreed as to the conduct.

20 Just in that vein, sir, there's a lot of discussion
21 about what Coinbase supposedly does or doesn't do. And in
22 particular, in your answer, your client and you by extension,
23 are extremely careful by parsing each allegation of the
24 complaint to let me know what you agree with, what you are
25 disagreeing with but it doesn't really matter, and what you are

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1 absolutely denying. I appreciate knowing that. I'm just
2 wondering about the degree to which that matters for this
3 motion. And my sense, the more I speak with you, is that it
4 doesn't.

5 MR. SAVITT: Your Honor, it does not matter
6 critically.

7 THE COURT: Okay.

8 MR. SAVITT: We agree. And that's because I think
9 this can be boiled all the way down to the question whether the
10 sale on a secondary market in a blind bid-ask transaction of a
11 token where no rights or obligations travel as part of that
12 transaction can be an investment contract, as that term appears
13 in the statute in the case law, on the strength of the
14 statements of intent or promotional statements that issuers
15 have made. I think the case, at least this branch of the case,
16 boils all the way down to that.

17 THE COURT: And on that point, my understanding of my
18 conversations with Mr. Costello was that he believes that
19 Coinbase is just being a bit too literal or too stentorian
20 about what that means, and that they are not suggesting it
21 needs to be a written contract or a formal document, and you're
22 not suggesting it either. What he's saying is though is that
23 there is an implicit relationship, an implicit agreement or at
24 least extension by the purchase of the crypto asset in a
25 situation where there's discussion or a lot of submissions on

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1 the part -- or I guess, white papers and such on the part of
2 the developers as to what is going to be done with this crypto
3 asset.

4 I think you are saying to me unless there's some
5 mechanism of enforcement in all of that very lovely promotional
6 and marketing language, it just doesn't matter. Do I
7 understand that correctly?

8 MR. SAVITT: I think that's fair, your Honor. To give
9 even a little more ground because we want to make for more
10 purposes of this motion our position capacious, there has to
11 be -- in the transaction that constitutes the sale of the
12 asset, there has to be at least as part of that offering, there
13 has to be a statement that is meant to convey an enforceable
14 promise. That's the irreducible minimum of what could be
15 conceived to be an investment contract knowing that we're
16 talking about contracts in the securities law context.

17 If you don't have that, then you don't have a contract
18 of any kind, anywhere in the vicinity and, therefore, you don't
19 have an investment contract. Here again, I would keep coming
20 back to the real estate cases where you had all sorts of
21 blandishments and suggestions about what was going to be built
22 out. And the courts, one after another, said not enough.

23 I talked about *De Luz* and *Rodriguez*, the *Revak* case in
24 our circuit is of a similar ilk. It didn't go off on the
25 efforts of others element but rather on the common enterprise,

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1 insisted on collateral agreements.

2 It insisted on collateral agreements, finding none,
3 the Second Circuit rejected the investment contract claim. So
4 we don't think it's fair, reasonable or, sensible statutory
5 interpretation to say that you're insisting on too much when
6 you're talking about an investment contract to look for a
7 contract. And the SEC has said that itself more than once.
8 The Supreme Court has said that itself. These cases all come
9 out the same way.

10 And what's marked here, in our judgment, your Honor,
11 is a departure. We've been criticized a little bit, I think,
12 from our friends at the other table for saying the rules of
13 *Howey* and its logic and reasoning don't apply to crypto. I
14 think the shoe is on the other foot. I think what's exactly
15 being promoted here is a view of what an investment contract is
16 and has been understood to be under the cases and within the
17 statute that is completely different than has ever been the
18 case.

19 It is not we who are unwilling to faithfully apply
20 that statute and that case law. It is the commission. They
21 are trying to stuff these transactions into the investment
22 contract rubric when it's perfectly plain from the words of
23 statute and the decided cases and the chairs' statements, that
24 they don't belong there. We think that's what's happening.

25 And it's a really important issue because at the end

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1 of it, agencies have authority. And the commission has broad
2 authority within the world of securities to regulate, but it
3 does stop at the water's edge. And if it doesn't, one is
4 casting about for a limiting principle. And I think the Court
5 has cast about for a limiting principle. We can talk about
6 that as well, but I don't actually think the Court has heard
7 one and I think that's a very big problem.

8 THE COURT: Actually, you're anticipating my next
9 question. You've obviously been paying attention. You saw my
10 lengthy discussion with Mr. Costello and the concerns that I
11 had and my requests for a limiting principle. He has given me
12 some. You don't accept them because they are not contract
13 based.

14 MR. SAVITT: You asked for a limiting principle with
15 respect to whether private plaintiffs could bring suit and I
16 don't think you did get one. I think you were told that they
17 couldn't.

18 THE COURT: Yes, that was what I was told.

19 MR. SAVITT: So that request for a limiting principle
20 was met with a response, no, thank you.

21 THE COURT: We'll no, no. We'll both be fair, fairer
22 to Mr. Costello. What he said was it wasn't by itself -- and
23 to the extent I'm thinking of it is sort of an opening of flood
24 gates to letting all this in. The putative private plaintiff
25 would still have to satisfy the securities laws. There would

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1 have to be some allegation of a purchase, or sale, or fraud or
2 something warranting rescission.

3 So I accept that I overstated the amount of private
4 plaintiff actions that could be tied to my decision in this
5 case. Although, there are some. He is at least admitting of
6 the possibility there are some so.

7 Yes, on that limiting -- I have a limit. It's just --
8 it's rather expansive but I have a limit. The bigger issue and
9 the issue with which I was discussing with Mr. Costello, is my
10 concern about this idea that simply looking at the promotion
11 materials of an issuer somehow makes the transaction an
12 investment contract. That purchase with knowledge of or with
13 reading of these materials makes it an investment contract.

14 What I was told, I believe, and he will tell me in his
15 summation part, is that it's more than that and there has to be
16 some sense that someone is buying in to the ethos or the
17 ecosystem of the issuer by purchasing that token. Now, that
18 may get them through 12(b)(6). Who knows what happens at the
19 Rule 56 stage. But I believe that to be the limiting principle
20 that I was given. I'll ask you to tell me whether I misheard
21 and whether it's enough.

22 MR. SAVITT: Your Honor, we heard the same thing. I
23 do think that's the commission's position. That's how we
24 understand it. And we don't think it's enough. We don't think
25 it's enough for a couple of reasons which I'll try to

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1 summarize.

2 The first is we're deeply unpersuaded that it is or
3 has been shown to be an actual limiting principle. By which I
4 mean the idea that by purchasing what is after all just an
5 asset, one buys into the ecosystem can be said about very
6 nearly anything because nearly every commodity of value, nearly
7 every collectible one can imagine has an ecosystem around it.
8 It doesn't really tell you whether you are in or you're out. I
9 want to circle back to the question of the conceptual and the
10 practical implications, and I'll jump on that before I shut up
11 if that's okay, your Honor.

12 THE COURT: Go ahead.

13 MR. SAVITT: I wanted to say before getting to that is
14 we've offered two limiting principles. And we don't think they
15 are parsimonious. One is if there's an investment contract
16 there needs to be at least the offering of what is meant to be
17 a contract. That seems fair.

18 We've also said that a further limiting principle is
19 that the investment needs to be in the business. And I think
20 the commission allies that point by saying it needs to be
21 around investment in the ecosystem. But I don't know what that
22 means. It means a statement of affiliation with it perhaps.
23 But let's be clear at least on the secondary market, which is
24 all we're talking about, your Honor, no one is giving anything
25 to the promoter. Period, full stop.

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1 THE COURT: Fair enough. But Justice O'Connor says in
2 *Edwards*, profits means the profits the investment seeks on her
3 investment and not the profits of the scheme in which she
4 invests. How do you square that with the argument you just
5 made to me?

6 MR. SAVITT: I think it squares well, your Honor. I
7 want to talk about *Edwards* a little bit because to state what
8 I'm sure that the Court is fully aware of, *Edwards* was a case
9 in which the Eleventh Circuit found that an investment contract
10 could not be had in circumstances where the investment contract
11 promised a fixed rather than variable return. That created a
12 circuits plea.

13 THE COURT: Right.

14 MR. SAVITT: In retrospect anyway, it's a peculiar
15 holding given that it's pretty clear that the securities laws
16 were each fixed on investments. So the Supreme Court reversed.
17 The question before the Supreme Court was this: Is the profit
18 or the payout that has to be available in the investment
19 contract context one that is tied to the profitability of the
20 enterprise?

21 And the answer to that question stated that way was
22 no. And the reason was even if the *Edwards* business wasn't
23 terribly profitable, or it was less profitable or more
24 profitable, a fixed return could issue. It was okay to have a
25 fix returned in the context of an investment contract. That's

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1 what Justice O'Connor was saying there.

2 I appreciate that plucked from that context that
3 appears to suggest something else, but it is not consistent
4 with the rest of that decision, as I'm sure the Court has seen.
5 And I would remind the Court that in the Edwards opinion, the
6 Supreme Court went out of its way to say this is just the way
7 the SEC has been interpreting this all the way along.

8 And your Honor looked at our second slide about what
9 the SEC told the Supreme Court was going on with an investment
10 contract, including a contract which is an agreement between
11 several parties. And it's really important because Justice
12 O'Connor was saying you can get a payout in an investment
13 contract scenario that is not commensurate with the
14 profitability of the enterprise if the contract is so
15 structured. But it was not saying that you could -- the profit
16 or payout could be untethered from the capital structure or
17 invested proceeds of the company's simpliciter. That makes no
18 sense in the context of that case or the long, long line of
19 Supreme Court cases that preceded and followed it.

20 THE COURT: All right. But we're talking about two
21 things. You are talking now about tethering to the capital
22 structure and earlier we were talking about the rights of the
23 putative purchaser to enforce. Help me with that because they
24 are two different things, yes?

25 MR. SAVITT: They are two different things. One of

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1 truly fascinating and head hurting parts of this case is the
2 more you think about them you see real points of intersection.
3 But the answer is yes. There are at least two very distinct
4 ways of holding the problem up to the light to understand how
5 to think about *Howey* and the contractual provision.

6 And I do think the relevance -- the reason, your
7 Honor, with apology, the reason I addressed *Edwards* in that way
8 is I perceived the question about that statement to go to that
9 issue but perhaps wrongly.

10 THE COURT: No. You've not misunderstood anything
11 that I've said. I just thought it was interesting that we
12 ended with the discussion with tethering to the capital
13 structure, when we began sometime earlier, with a discussion
14 about enforceability. I wonder if you could pause for a
15 second, sir, and talk with me, not to me, about the decisions
16 this past year from Judge Rakoff and from Judge Torres. And
17 why don't we all just stipulate, lest we be accused of either
18 complimenting them or criticizing them unduly, that these are
19 hard issues. And maybe they came out differently, maybe they
20 didn't come out differently. Maybe the decisions can be
21 reconciled.

22 But I want to -- for example, with respect to the
23 *Terraform* decision, and in particular the motion to dismiss, I
24 think there was some discussion about the need for some sort of
25 contractual right, and I thought that Judge Rakoff wasn't

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1 really feeling it, as it were. But I acknowledge that
2 *Terraform* is quite different from the facts of this case.

3 Separately, I myself, I'm following Judge Torres'
4 decision and it's on very difficult subject matter. Although,
5 I don't -- I think I tripped when I got to the
6 primary/secondary market transactions distinction. And when
7 you began your discussions with me by talking about the blind
8 nature of the buys and sells here, I thought, ah, I have to
9 remember to ask him about that and what importance he ascribes
10 to that distinction that Judge Torres has found in her
11 decision.

12 So that's a very long question, and I'll try and do
13 better this time around. Let's start with *Terraform*. Is Judge
14 Rakoff right or wrong?

15 MR. SAVITT: I don't know.

16 THE COURT: Okay.

17 MR. SAVITT: It's a very different case. I think we
18 disagree with meaningful aspects of Judge Rakoff's analysis.
19 There's a big however which is --

20 THE COURT: Right. Because he then finds -- I thought
21 he found that the asset was not itself an investment contract
22 but could be used in an investment contract.

23 MR. SAVITT: I do think that was part of what Judge
24 Rakoff was saying there. And though we would probably disagree
25 with certain aspects of his holding. Our view, when you put

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1 the decisions together, the motion to dismiss and the summary
2 judgment decision together, we think even if that mode of
3 analysis were applicable here, our motion would survive.

4 Let me say why. The *Terraform* case, first of all, as
5 I know the Court knows, did not involve secondary market
6 transactions. There were no secondary market transactions in
7 that case. The SEC went out of its way to tell the Court that
8 it wasn't dealing with the secondary market transactions.
9 Those were all situations where there was a relationship of
10 privity between the investor and the promoter. It's a very
11 important point of distinction.

12 Judge Rakoff said ultimately in *Terraform* and I think
13 I have this right, that no formal contract was necessary to
14 form an investment contract. Fine, we agree with that. What's
15 required in our judgment is a showing that the promotor had
16 held out the promise of something meant to convey a contractual
17 promise.

18 But Judge Rakoff does apply as follows, and I think
19 these are his words, a investment contract at a minimum
20 requires the contracting parties to agree or scheme together
21 that the contractee will invest in the contractor's profit
22 seeking endeavor. Now, that would probably be a point of
23 disagreement between the way we're framing this matter and are
24 litigating it to your Honor, and the way it's going to be
25 rightly decided in Judge Rakoff. But we can live with his

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1 formulation.

2 The reason is, the SEC in this case, hasn't alleged
3 anyone agreeing or scheming together to invest in the
4 contractor's profit seeking endeavor. The allegations here
5 show no agreement of any kind as between these trades on the
6 secondary market between strangers to invest in any contractor,
7 that is to say promotor's business. And there is still less
8 any kind of agreement that the buyer's payment be invested in
9 that business. So that's one point I really wanted to
10 emphasize about *Terraform*.

11 Second, is moving to the summary judgment ruling.
12 It's a very -- the texture of that decision seemed to us to be
13 quite a lot different. And while the Court did enter summary
14 judgment on the investment contract issue, it did so, first of
15 all, on the basis of recognizing some contractor, contractee
16 relationship, which I've just said. And it also went out of
17 its way to emphasize that there were ongoing relationships and
18 obligations with respect to the token.

19 So as to the USC token, which is the dollar
20 denominated, the dollar paid token, the Court relied on the
21 fact that the token could be deposited in the anchor protocol
22 and earn pro rata interest or dividends, thereby demonstrating
23 that that investment was one that was in the ongoing
24 enterprise.

25 As to LUNA, the court relied on the representations of

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1 the company that the token would carry a claim to a
2 distribution of transactions fees. Again, proceeds coming from
3 the enterprise to the investors in a relationship of privity.
4 And similarly, with the MIRA protocol token, the Court found
5 that it earned fees from asset trades.

6 So we might have a lot to quarrel about with Judge
7 Rakoff's decision, but the truth is we can live with its
8 analysis because it recognized -- it recognized ultimately,
9 that there has to be a contractee/contractor relationship and
10 there has to be some ongoing engagement with the assets of the
11 enterprise. Nothing like that is alleged in this case, your
12 Honor. So that is why we're holding the *Terraform* case up to
13 the light.

14 THE COURT: Could you then speak to the *Ripple* case?

15 MR. SAVITT: Well, *Ripple* starts with the correct
16 first principals. Judge Torres says digital assets aren't
17 securities. And then it goes on to analyze whether the various
18 transactions are investment contracts. And there, as here, the
19 question whether a security existed was strictly a matter of an
20 investment contract. What it found, Judge Torres -- what the
21 Court found in Judge Torres's case, is applying *Howey* to
22 secondary market trades could not give rise to an investment
23 contract. That was what Judge Torres found.

24 We don't think all of the same arguments were raised
25 here as in that case. But the critical takeaway there is that

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1 Judge Torres recognized that secondary market token purchases
2 of XRP were not investing in *Ripple*. And in that sense it
3 rejected what I think is a core portion of the commission's
4 argument before the Court today, which is that it's investing
5 in an ecosystem. At least in respect to transactions between
6 strangers where no relationship exists, where no obligation to
7 travel. That couldn't be said there and it can't be said here.
8 *Ripple* couldn't make any promises to those people because it
9 didn't even know who they were.

10 Same here with each of the twelve tokens at issue.
11 These applied but as trades, and therefore, as a matter of law,
12 Judge Torres held, and we think correctly on this, investment
13 contract law doesn't apply. These trades couldn't be
14 investment contracts and therefore, couldn't be securities.
15 And we think that branch of the holding, which was
16 determinative in that case, as to the trades that are at issue
17 here, secondary markets trades, is it's a very close cousin of
18 the issue right before the Court.

19 THE COURT: Yes, I understand that and I think that's
20 probably where the commission disagrees with it so much. The
21 issue here -- I'm not disagreeing with your recitation of it.
22 I guess I'm not familiar with -- in other aspects of securities
23 laws in other cases that I've had where the primary/secondary
24 market distinction holds so much force, and where the notion
25 or, indeed, the fact that it's blind bid, blind asset trades

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1 matters so much.

2 Am I wrong? Or are there other areas where it really
3 does -- where it has similar importance? Here, I just don't
4 remember having to focus on this in other securities cases I've
5 done.

6 MR. SAVITT: Thank you for that question, your Honor.
7 It goes right to the heart of what is interesting about this.
8 Let's talk about stocks. Stock, they trade in blind bid-ask
9 the time and no one would think it's not a security. A stock
10 reflects an interest in the permanent capital of a corporation.
11 And when it trades, that interest in the permanent capital of
12 the corporation which is a participation in its capital
13 structure, transfers in entirety from one holder to another
14 holder.

15 Attached to a stock are a bundle of rights:
16 Inspection rights, right to sue, right to dividends, right to
17 dissolution, all that good stuff. They transfer in their
18 entirety from one seller to the other seller. And therefore,
19 in every case like that, the issue doesn't come up because it
20 doesn't matter who holds it. They hold the same bundle of
21 interests, the same claims against the same entity, insofar as
22 they are just trading interest in permanent capital.

23 Much the same can be said about what trade commonly is
24 notes are on. Investment contracts are different because
25 investment contracts are assets stapled to obligations. And

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1 the relevant question in every case is going to be whether with
2 the asset travels the legal obligation. You don't need to ask
3 that question in the context of a bond transaction, your Honor.
4 It does. You don't need to ask that question in the context of
5 a stock transaction. It all travels. These are different, and
6 that's why.

7 And it just won't do given the requirements of an
8 investment contract, we don't think, to say that it's the same
9 transaction on the secondary market as on a primary market.
10 Because whatever may have traveled with respect to the ICO is
11 not likely to travel in a secondary offering. But what matters
12 for our motion, your Honor, is it's not alleged to have
13 traveled. And no one can say that in the context of a bond or
14 stock sale.

15 THE COURT: We've had thoughtful discussions for a
16 while now on the idea about the need for a contractual
17 relationship and an ongoing engagement with the assets of the
18 enterprise. I think in another section of your briefing, a
19 distinction that you draw or an argument that you make is that
20 an investment contract must share the essential attributes of
21 other securities.

22 I assume that is just a variation on the theme and
23 that what you're saying is, for example, that you have to have
24 something more than ownership of the asset. Perhaps you have
25 some interest in the enterprise, perhaps you have something

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1 else. But I do want to make sure, when you're talking about
2 essential attributes and that's your argument, is that
3 something different than what we've been talking about? And if
4 so, what are the essential attributes that I you think I should
5 be looking for here?

6 MR. SAVITT: I think what I'd say in response to that
7 question, your Honor, is first of all, when one looks at the
8 definitional provision of the 33 and the 34 Act, the 34 Act as
9 is relevant for the 12 that we're talking about now, there are
10 a list of securities and investment contract is one of a bunch.

11 (Continued on next page)
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1 MR. SAVITT: And each one of them is an instrument
2 that carries the legal entitlement to the proceeds, assets, or
3 profits of an ongoing business enterprise. And so part of our
4 argument is that investment contract should be understood to be
5 consistent with that recitation, and that is what, in the words
6 of the statute, makes something commonly known as a security,
7 as opposed to buying the output of what a company makes. It's
8 the difference between investing in Beanie Baby Inc. and buying
9 Beanie Babies. It's the difference between those two things.

10 Additionally, we call attention to Judge Posner's *Wals*
11 decision, which I'm pretty confident was picked up in the SEC's
12 briefing.

13 THE COURT: Yes, we talked about it earlier.

14 MR. SAVITT: It talks about the essential instruments
15 of a debt or equity instrument. And it's the same point, we
16 think, but it's something different than the output of a
17 company. It's debt, which is a senior contribution to a
18 capital structure that's put to work by a company, or equity,
19 which is the residual claim that is junior capital structure.
20 And the things that are now being forced into the investment
21 contract, we think, are different because they play no part in
22 the capital structure, and they carry no claims against the
23 ongoing enterprise and carry no contractual rights at all.

24 THE COURT: Just one moment, please. Thank you.

25 In the interest of transparency, as I was taking my

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1 notes over the weekend for this conference – I can't define
2 when precisely I was typing this up – one of the issues that I
3 had was that I believed it was difficult for Coinbase to argue
4 that a crypto asset purchaser has merely a hoped-for increase
5 in the value of the asset itself. Because to me, to the extent
6 that the purchaser had a hope for an increase in the value, it
7 was because of the efforts of the developer or the issuer.

8 And I think what I'm understanding from our
9 discussions this afternoon is that you're not disputing that as
10 far as it goes, but for you, for your client, the issue is that
11 there is missing or at least missing allegations of some sort
12 of way of enforcing that hoped-for increase in the value of the
13 stock. And similarly, that there is no manner by which the
14 purchaser remains engaged on an ongoing basis in the assets of
15 the enterprise. Am I understanding that argument correctly?

16 MR. SAVITT: I think that's fair, your Honor.

17 THE COURT: Or tell me I'm overstating your hoped-for
18 increase.

19 MR. SAVITT: I don't think our argument, at least for
20 purposes of this motion, is really fighting about whether
21 someone's hoping for the increase. And we appreciate that the
22 commission has alleged that there were statements made that
23 someone might have thought, if they were followed through upon,
24 were going to lead to the increase. For purposes of today
25 we'll accept that.

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1 But it's not enough to make an investment contract.
2 And it's not enough as a word of simple English when you think
3 about investment contract, but it's not enough under the cases.
4 And here again, just to bang this drum, when you look at the
5 real estate cases, you'll see they're very similar. And Judge
6 Bodine has an analysis that says at some point, if the promises
7 are enough and they seem enforceable enough, you have an
8 investment contract.

9 There has to be something that's held out that's
10 enforceable. That's what case after case after case says, and
11 that's what missing here. And it's really an important issue
12 because there is no limiting principle otherwise, and that's
13 because the vast majority of type of investments are going to
14 be accompanied by someone saying something, but they aren't all
15 securities. And the question is what is and what isn't.

16 You could have a situation where it isn't enough for
17 the commission to say, Trust us, we're not going to use this
18 authority except when it makes sense. Because that can lead to
19 a company thinking it was complying with the securities laws
20 and then being on the receiving end of an enforcement action.
21 That's a familiar scenario for us. It could also lead to any
22 number of businesses believing they're operating essentially in
23 dealing what are non-securities and finding out that they're
24 not, because every commodity has promotional statements around
25 it, and they aren't all securities.

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1 And what makes it different is the contractual
2 undertaking that gives an interest in the business. If you
3 don't have that, you don't have a security. So I'm sorry for
4 the long-winded answer. The short of it is you're right that
5 we accept that there is an investment, and someone might think
6 the promotional statements might, if acted upon, give rise to
7 an increase. Our position is that's not enough, that the cases
8 say it, and they say it over and over again.

9 THE COURT: Where is this in *Howey*? I mean, I
10 understand from the Securities Law Scholars that the
11 precursors, the state law antecedents to *Howey* speak about this
12 or at least they arose in that context. But the actual
13 definition doesn't itself speak of either this contractual
14 relationship or means of enforcement or the ongoing engagement.
15 So I don't know where it comes from, and I'd like to know where
16 you're slotting it in in the *Howey* test, if anywhere. Let's
17 start with that.

18 MR. SAVITT: Well, it's a fair question. *Howey* only
19 applies to instruments that constitute a contract, transaction,
20 or scheme. And one answer to your Honor's question is it's
21 none of those things. It's not a contract, it's not a
22 transaction, it's not a scheme. And we've talked about how
23 it's not a contract, and we've shown, I think, that it's not a
24 scheme, as that phrase was understood in *Howey*.

25 It is true that we have chosen in our presentation to

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1 the Court to not reduce *Howey* to three elements and then
2 ritualistically go through each of the three elements, and we
3 did that for several reasons. One is that, as I mentioned
4 earlier, there's a great deal of intersection between the
5 issues, for example, the need for a contract came up in the
6 context of a collateral agreement in *Revak* in the discussion of
7 the common enterprise, but it came up in the other circuit
8 cases in the context of the reliance for profit solely on the
9 work of others.

10 So these issues cut through, but they do not appear
11 all the time in the same place, but they appear over and over
12 again in the *Howey* jurisprudence. When the Supreme Court talks
13 about *Howey*, it doesn't reduce it to three elements. It looks
14 at the instrument in front of it, and it tries to figure out
15 whether it fits within the traditional definition of a
16 security. A lot of the circuit court cases do the same thing.
17 The *Wals* case does and *Rodriguez*.

18 We would broadly say this, that much of what we say
19 about the need for a contractual undertaking demonstrates the
20 lack of any adequate pleading as to the generation of profits
21 from the efforts of others, because those cases all say that
22 has to be something that you can go and get, at least has to be
23 promised to you that you can go acquire that, so it fits in
24 there. And much of what we say about the SEC's failure to
25 allege interest in an enterprise demonstrate a failure to plead

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1 a common enterprise within the *Howey* factors. And that's why
2 we cite not just *Howey* over and over again, which we do, but
3 the cases interpreting it.

4 THE COURT: To that point, I have two reactions going
5 in two different directions. And one was I thought you were
6 about to step in the trap that Mr. Costello laid for you
7 earlier where he discussed how Coinbase's citation to or use in
8 any way of the *Howey* test undercut its major questions doctrine
9 argument because, by acknowledging *Howey* as being the playing
10 field on which these issues are to be resolved, you're
11 necessarily suggesting that there isn't some void, some almost
12 *ultra vires* activity that the commission is doing, which would
13 implicate the major questions doctrine.

14 Thing two is I had a question to myself, which is how
15 your arguments applied or was the logical extension of your
16 arguments to be that there could be no common enterprise with
17 respect to the 12 or 13 tokens. So we can save major questions
18 for your colleague, who I know is going to speak to that, so
19 she'll know to talk about that. But can you help me understand
20 how, if at all, your arguments about the need for contractual
21 or ongoing relationships – and I'm very much short circuiting
22 them by calling them just with those few words, I'm just sort
23 of evoking them for you – how that impacts the common
24 enterprise analysis.

25 MR. SAVITT: Well, I don't think it's impossible that

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1 a token could have those characteristics and satisfy the *Howey*
2 test, and we said that in the abstract. We haven't talked
3 about Judge Castel's decision in *Telegram*, but that is a really
4 interesting case along these lines, the primary issuer case.
5 And I want to be clear on that because it's suggested in the
6 briefing that it's not, but the SEC was plain as day that it
7 was, and I think the case is clear.

8 But that was a situation where there was a contract
9 right in the middle of the case. It wasn't anything like this,
10 the Gram purchase agreement. And it provided for certainly a
11 contractual undertaking, and one in which there were going to
12 be payments made in tokens for the performance of the
13 enterprise or the return of the investment if the blockchain
14 wasn't launched. And that seemed to be a very reasoned
15 application of all of this in the *Howey* prongs. It fit in a
16 way, because you were able to look at the way the funds were
17 invested, see them pooled in a common enterprise, and you were
18 able to see the contractual undertaking that made for the
19 return.

20 Many of the cases, however, that are shoehorned into
21 the complaint and might otherwise be litigated just can't fit.
22 And one of the things that caused us to think a little
23 differently about *Howey*, your Honor, in this case is that it's
24 a unique case – and I use that word advisedly – where the SEC
25 alleges that an investment contract changes hands on a

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1 secondary market. That's new, and it fits very, very -- with
2 real difficulty analytically with *Howey* because *Howey* was a
3 privity case, a primary issuance privity case. Nearly every
4 single one of the cases that followed it was a primary issuer
5 privity case. The only one that wasn't was maybe the *Hocking*
6 case, which we've talked about in our brief, and I won't bore
7 the Court with.

8 It seems in the context of a secondary transaction
9 very difficult to shoehorn a blind transaction that required a
10 contractual undertaking into the *Howey* analysis, which I do
11 think fairly said wasn't built for that. But I want to be
12 clear, we have no fear of *Howey*. It's a case that says an
13 investment contract requires a contract. It actually says that
14 the investment contract anticipates a investor taking shares in
15 an enterprise. And it says repeatedly that those shares are to
16 be evidenced by contracts and leads, and those contracts,
17 indeed, should determine the future payout due investors. That
18 was *Howey*, and that's our case.

19 THE COURT: Speaking for a moment, going back to
20 *Terraform* and also Judge Barbadoro's *LBRY*, I thought I
21 understood and at least it's been suggested to me that I should
22 understand those cases to stand for the propositions that what
23 matters for purposes of whether these were investment contracts
24 or whether it's securities was whether the tokens were marketed
25 as profitable investments and whether the profits were derived

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1 from the efforts of the issuer's management team.

2 Now, neither of your issues, either a means of
3 enforcement or sort of an ongoing interest or relationship, is
4 present. Has the argument that's been made to me, does it just
5 overlook important things of *Terraform*? You've already talked
6 about *Terraform*. Perhaps *LBRY* is the place to talk.

7 MR. SAVITT: I guess I do want to emphasize that *LBRY*
8 is a pure ICO primary trading case, and that's a very important
9 point of distinction. And because it was an ICO case, the
10 matter of the contractual undertaking was much easier to
11 resolve, and there were findings about the way those proceeds
12 were invested to launch the enterprise.

13 On the subject of our slides, I'll just draw the
14 Court's attention to slides 10 and 11. And we think this is
15 really important because we don't think these cases, which had
16 only to do with the ICO context, the initial offering context,
17 the primary privity context, can be imported into the secondary
18 arena. In the briefing, the commission suggests that they
19 stand for the proposition, that primary and secondary
20 transactions ought to be viewed in the same way.

21 In every one of these cases, the commission stood up
22 and told the judge we're not talking about secondary trades,
23 they're different, each one of them, including on the last slide
24 here, 11, you can see that the judge even seemed quite
25 frustrated about it. Every time he raised the matter of

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1 secondary transactions, "We're not litigating that here. The
2 commission has to decide that." Blah, blah, blah. And then
3 the Court said --

4 THE COURT: That's the actual transcript, huh?

5 MR. SAVITT: "Have I misunderstood your position?
6 No." So those cases are just not apposite here. They concern
7 a very different factual predicate.

8 THE COURT: Okay. Thank you. I'd like to give you a
9 break, please.

10 If I can turn to your colleague, Mr. Schwartz, to talk
11 about why my discussions with Mr. Margida about Wallet and
12 staking were all wrong. Thank you, sir.

13 MR. SCHWARTZ: Not all wrong, your Honor.

14 THE COURT: Okay, great.

15 MR. SCHWARTZ: Your Honor, I'll start with Wallet, if
16 that's comfortable.

17 THE COURT: Please.

18 MR. SCHWARTZ: There are actually very few allegations
19 put at issue in the Wallet claim. And as you heard from our
20 friends at the front table, the law is well settled, and the
21 parties aren't disagreeing about what it is. We both cited the
22 same nine factors, and I think there's no real dispute that
23 nearly all of them are absent from the SEC's allegations. They
24 don't dispute that they haven't purported to allege the variety
25 of core brokerage activities that are traditionally found by

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1 Courts, negotiating terms for the transaction, making
2 investment recommendations, arranging financing, holding
3 customer funds, conducting independent asset valuations. None
4 of these core factors are addressed at all, even purport to be
5 alleged.

6 What they do say they allege, and that's what I want
7 to turn to, as my colleague said, you may find it helpful to
8 look at page 15 in the deck. This just sets out on one slide
9 for you so you can see the four paragraphs in one place that
10 the SEC points to as sufficient pleadings to survive the motion
11 for judgment on the pleadings. We think these fail as a matter
12 of law to support a claim that Wallet acts as a broker. I'll
13 point you to 6482 to start. Those together talk about Wallet,
14 routing, customer orders through third-party decentralized
15 exchanges, assets from blockchains available to swap via
16 Wallet, price comparisons across multiple exchanges.

17 What you don't see in these allegations, your Honor,
18 are any well-pleaded facts showing that Wallet itself is doing
19 any of these activities beyond allowing users access to the
20 third-party platforms who give that functionality, who carry
21 out those activities. And here, your Honor asked about this
22 earlier, and we want to direct your attention to it. In the
23 user agreement, which is incorporated in the complaint by
24 reference, lays this bare, the bottom line that it's not
25 wallet, but it's third-party platforms that are carrying out

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1 the very activities the SEC is referencing.

2 And here, if you turn to slide 16, your Honor, you'll
3 see the portion of the Coinbase user agreement excerpted for
4 you setting forth what happens in Wallet. The app or browser
5 provides a link to the platform. Through the link, users
6 "navigate away from the Coinbase site to the dApp or the DEX."
7 And you know, your Honor put it very well in the Uniswap case.
8 Once Wallet provides a technical connection to the third-party
9 platforms, customers then direct the smart contracts on those
10 platforms, like the Uniswap trading platform, to take the
11 digital assets out of Wallet and carry out the swaps or
12 whatever activity those exchanges permit.

13 There are no well-pleaded facts to the contrary here
14 suggesting that these activities occur within Wallet itself.
15 And I'll just add, your Honor, there was an earlier colloquy
16 about 0x, which is yet another one of these third-party
17 exchanges. It's an information-based protocol that connects up
18 to third-party platforms. That is not within Wallet. It's not
19 alleged to be within Wallet, by the way.

20 My colleagues at the front acknowledged that. It was
21 noted in our footnote on page 27 of the brief. It was not
22 alleged in the pleadings. But I'll hasten to correct it
23 anyway. 0x is one of those third-party platforms to which the
24 Coinbase Wallet user interface connects those users to do
25 activities on a third-party platform. And that's a critical

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1 correction or clarification in light of the limits of the
2 pleadings and the user agreement that's fairly before the
3 Court.

4 Another activity they point to in paragraph 75 you had
5 a discussion about earlier was solicitation of investors as
6 something that was purportedly alleged. If you look back at
7 paragraph 75, again, on slide 15, the allegation is that
8 Coinbase solicits customers by advertising features of Prime
9 platform and Wallet advertising to download the software.
10 That's nothing like the findings that courts have made for
11 solicitation of investors for particular investment
12 transactions.

13 That's the broker solicitation courts have addressed
14 in the cases the SEC points you to, *Hansen, Martino*. In the
15 SEC's brief, those cases are ones that identified as brokers
16 agents of issuing companies who actively targeted prospective
17 investors to raise capital by telling particular investments.
18 None of that is alleged here.

19 And so here, again, I think it's fair to consider
20 solely the limits of the allegation and the absence of
21 well-pleaded facts, adding anything of the sort to solicitation
22 of investors to conclude that this, too, is not alleged as
23 wallet activity.

24 Lastly, you had a discussion about paragraph 101, the
25 last one listed on slide 15, that Coinbase used to charge

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1 customers transaction-based compensation for the activities on
2 those third-party platforms. Coinbase no longer does charge
3 for those activities. But even if it did, it's important to
4 say the courts have been crystal clear, and it's long been
5 true, commission-based payments standing alone do not make
6 brokerage activity, and that's not in dispute.

7 THE COURT: But they're not suggesting that the
8 commission standing alone would've made Coinbase a broker.
9 They're suggesting what you say is providing access to
10 third-party dApps and things like that. The concern I have --

11 MR. SCHWARTZ: Absolutely true.

12 THE COURT: The concern I have is you all seem to have
13 a dispute about the facts. I think I'm hearing you to say, so
14 tell me, that I can resolve that dispute in this context
15 because the user agreement and other statements, when compared
16 with the paucity or the abstractness of the commission's
17 allegations -- no offense -- is enough to allow me to find as you
18 wish me to find. But I think they're saying, Not yet, Failla,
19 you've got to let this go through to discovery.

20 MR. SCHWARTZ: Yes, your Honor. I think that's
21 exactly right.

22 With respect to the allegations in 6482 we talked
23 about, that paucity, saying that Wallet does something through
24 third-party platforms, that something happens via Wallet that
25 the price compare happens on, each of those is the circumstance

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1 you just described where the paucity plus the user agreement
2 gives you ample basis to decide the pleadings don't suffice.

3 But where I'll round out the picture is with respect
4 to the solicitation of investors, the only other core broker
5 activity the SEC claims to have even alleged, that on its face
6 does not allege what is understood as a matter of law to be the
7 solicitation of investors by brokers.

8 THE COURT: I see. I appreciate the clarification.
9 Thank you. Let me just take note of that.

10 MR. SCHWARTZ: Your Honor, in case useful, it occurs
11 to me from your discussion, one way that the SEC has sought to
12 suggest there's an alternative frame or some different version
13 of facts, is by saying the user interface connects and
14 therefore facilitates, puts these parties together. Again,
15 this is not a fact dispute. As a matter of law, that
16 facilitation or putting parties together does not make
17 brokerage activity.

18 And I'll point your Honor's attention to a case in our
19 briefing, the *Rhee* case. This is also found in the *Foundation*
20 *Ventures* case. But Judge Liman in the *Rhee* case made clear
21 merely providing information or bringing two parties together
22 to make their own contract does not transform an individual or
23 entity into a broker, even if they receive commission-based
24 payments. At most, it's the activities of a finder, and that
25 is not subject to the security laws. In that case, the person

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1 at issue didn't negotiate the transaction, didn't engage in
2 substantive conversations, give valuation advice, the variety
3 of core activities I mentioned that aren't even purported to be
4 alleged here.

5 THE COURT: Fair enough, sir. But I think the concern
6 of the commission, and it might be a concern that I share, is
7 to the extent that what we're talking about is how you can
8 implement technology to make things faster, easier, have access
9 to even more entities, there's a concern the commission has
10 that it can't just be that technology obviates a finding that
11 one is a broker. Because if you do broker e-functions, but you
12 do them through some sort of automated mechanism that you have
13 at your disposal, you might still be a broker. I think that's
14 what the commission is saying.

15 I think what you're saying, and let me just confirm
16 that, is that the allegations that are contained in the
17 pleadings, as amplified or perhaps given further detail by the
18 user agreement, are just not enough. Am I understanding your
19 argument correctly?

20 MR. SCHWARTZ: I think that's exactly right with
21 respect to those activities that the commission claims to have
22 alleged. And there's no dispute about the variety of core
23 activities they don't claim to have alleged that I mentioned at
24 the outset.

25 THE COURT: Right. So there are a number of factors

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1 that I may consider in determining whether someone is acting as
2 a broker. You're saying they don't allege all nine or
3 whatever, they allege a couple. And as to those, there are
4 reasons to disbelieve or to view with skepticism the
5 allegations that are made?

6 MR. SCHWARTZ: Yes. We would say there's reason to
7 find there are not well-pleaded facts to support those
8 allegations.

9 THE COURT: Or that. Shall we then speak of staking,
10 sir?

11 MR. SCHWARTZ: Yes, absolutely.

12 THE COURT: Are there slides about staking?

13 MR. SCHWARTZ: You better believe it, Judge? I will
14 turn your attention – in fact, I hope it's helpful – slide 17
15 was designed late at night, bearing in mind and reflecting on
16 the last time we all gathered, and so I'm very glad to give
17 that some attention.

18 Your Honor asked a question about what's properly
19 before you when it comes to staking back in July, and that's
20 why we thought it might be worth stepping back to frame what is
21 properly at issue in the pleadings when it comes to the staking
22 product. And to be clear, we think there are three different
23 reasons, each sufficient on its own for this claim to be
24 dismissed.

25 But I'm going to start with the investment of money,

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1 and let me frame this for you. We've set out here the various
2 provisions from the allegations in the complaint and from the
3 user agreement, which we think suffice to give you the picture
4 of the facts that are relevant for disposing of these
5 pleadings.

6 At the foundation of blockchain is the need to
7 validate each new block or transaction that's added before it's
8 added to ensure the security and accuracy on a consensus basis.
9 Can you see that in paragraph 312. Where staking comes in,
10 your Honor, is from two propositions, again, set out in the
11 sources before you. Number one, blockchains that use proof of
12 stake to achieve the consensus I mentioned, set a fee, they
13 call it "rewards" that they pay to token holders to perform
14 this critical validation service. That's set out in paragraphs
15 312 and 313 of the complaint.

16 Number two, the users who take on this validation
17 service to put up or stake some of their tokens while they're
18 performing the validation service they get paid for,
19 paragraph 313 calls these staked assets is collateral,
20 collateral against improper validation, and collateral that's
21 held in the protocol while the services are being carried out.

22 For token holders who stake on their own, your Honor,
23 that's it. It's a fee for validation service for the
24 blockchain. And you can identify that again in the allegations
25 before you confirm by the provisions of the user agreement.

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1 Some users then choose to subcontract that service to Coinbase.
2 They hire Coinbase to operate the IT, to validate on their
3 behalf, and they direct Coinbase to take their tokens on the
4 blockchain while that happens. Those are the facts from the
5 complaint and the user agreement.

6 And with these in hand, we think, you can turn to each
7 of the two reasons – we'll start with the investment of money –
8 of why the complaint fails to plead an investment of money
9 under *Howey*. And I'll begin, your Honor, just with a case that
10 the SEC emphasized to you, the *Rubera* case from the Ninth
11 Circuit. The Court of Appeals there said one has to "commit
12 assets to the enterprise in such a manner as to face the risk
13 of loss." And I want to focus on the first part of that.
14 Commit assets to the enterprise to have an investment of money,
15 sound straightforward. Without a contribution of assets to the
16 capital structure, there's just no investment.

17 Here, the SEC has made no allegation, there's no
18 plausible claim that they could, that staking customers commit
19 anything to Coinbase in this case in this way. They just
20 direct Coinbase in the normal custodial relationship to make
21 their tokens available to the blockchain as collateral, as
22 paragraph 313 puts it, for a potential slashing for validation
23 and to provide IT services in connection with it.

24 Now, the sole way that the SEC tries to satisfy this
25 commitment of assets requirement – I'll point you to slide 18

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1 for this, just to put their allegation in front of you,
2 paragraphs 340 and 341 and repeated elsewhere – is to tell you
3 staking customers tend to just give up control over their
4 tokens to Coinbase. And here, going to your question earlier
5 about where something is wrong but properly before you to
6 resolve, center stage, your Honor, this bare allegation
7 warrants no credit, and it's contradicted by the user
8 agreement.

9 You can see on the next slide, slide 19, Section 2.7.3
10 of the user agreement, and the appendix which established,
11 "You, the customer, control the digital assets held in your
12 digital wallet." And Appendix 4 extends this to staking
13 services whether or not the digital asset is staked. And this
14 is important in granting a motion to dismiss the *Underwood*
15 complaint against Coinbase. Judge Engelmayer addressed the
16 same user agreement, and much as your Honor described earlier
17 said, "Where a document is incorporated by reference, the Court
18 need not accept contrary allegations in the complaint that seek
19 to allude the facts contained in the incorporated document."
20 His words were the user agreement checkmated those plaintiffs
21 from adequately pleading their claims.

22 And your Honor, you won't be surprised to hear we
23 think you should likewise find the SEC's bare allegations that
24 customers give up control over staked tokens in order to claim
25 there's a commitment of assets, it's checkmated by the user

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1 agreement. And taking that aside, there are no well-pleaded
2 facts suggesting that anything about this relationship, this
3 fee-for-service relationship that users have with the
4 blockchain and they subcontract to Coinbase, there is no
5 commitment of assets, there is no contribution of capital by
6 the users to Coinbase's capital structure that could possibly
7 satisfy the investment of money requirement that *Rubera* and
8 Courts have long required.

9 Another aspect of staking you asked about, your Honor,
10 unless there's a further question about that, is risk. We
11 spent some time in colloquy about risk. And that goes to the
12 second half of *Rubera*, of the sentence from *Rubera*, again, that
13 the SEC is trying to rely on.

14 THE COURT: Are you suggesting that it's wrong for
15 them to rely on it?

16 MR. SCHWARTZ: No. I think it's the right case to
17 rely on, it just doesn't help them. Unfortunately, their
18 allegations fall short of that standard of law.

19 And here, again, I'll just quote you the back half of
20 what we said, "An investor must commit his assets to the
21 enterprise in such a manner as to subject himself to financial
22 loss." And it's not just the Ninth Circuit; the Second Circuit
23 has affirmed that the Supreme Court added this limiting
24 requirement, as well.

25 Now, on slide 20, your Honor, you'll see the handful

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1 of paragraphs that the SEC tells you suffice to allege risk of
2 loss from staking. And I'm happy to take you through them.
3 I'll tell you broadly speaking, apart from the conclusory
4 allegation at the top, the first two, 341 and 343, concern
5 blockchain requirements for staking and validation. The bottom
6 two don't concern staking; they're just risks that are general
7 to token holders. Both buckets of these allegations fail as a
8 matter of law to rise to assert risk of financial loss in the
9 commitment of assets to the Coinbase enterprise.

10 THE COURT: Let me ask you to pause for a minute, sir.
11 I've spoiled myself a little by looking at the next slide,
12 slide 21, which speaks about the risk of loss and how it's
13 discussed in the user agreement. My reaction to reading the
14 briefing was that I thought that Coinbase argued in a number of
15 ways that the risk of loss was infinitesimal or that the risk
16 of loss was something that could be addressed and made up for
17 by Coinbase if anybody lost money or that the risk of loss was
18 the same if you were self-staking or that the risk of loss was
19 something that you would have just as a customer of Coinbase,
20 irrespective of whether you staked or not. But all of those
21 arguments, they sounded to me a little bit defensive because
22 they all seemed to presuppose that there was a possibility of
23 loss.

24 If the Ninth Circuit test that we're saying is the
25 right test to use is that the risk of loss is itself enough,

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1 then the fact that the risk of loss is really small, could be
2 made up, or could happen in other circumstances, I'm not sure
3 it gives me a complete answer. Can you help with that?

4 MR. SCHWARTZ: Thank you for the question. It covers
5 the waterfront really well, and so let me try to take it in a
6 few pieces, if I can.

7 Let's distinguish the two buckets, if you will, those
8 relate to staking in some way and those that don't. Because I
9 don't think we would say that the risk is just so small, you
10 don't have to worry about it. The risk of loss does not exist
11 on the pleadings and the user agreement before you. The first
12 risk they point to is slashing, your Honor, this idea that
13 there could be improper validation and the staked assets are
14 slashed. But that same paragraph, 343, acknowledges that is
15 not a risk that Coinbase stakers face. It doesn't say it's
16 small. It's not a risk that Coinbase stakers face because
17 Coinbase indemnifies for it.

18 Now, they go on to say there's still general risk.
19 I'll just flag for your Honor that quote on the rest of 344 is
20 from a money transmission disclosure that Coinbase has for New
21 York State where paragraph 333 of the complaint acknowledges
22 Coinbase does no staking business. So that quote has nothing
23 to do with staking. So there's a discussion about slashing
24 risk, Coinbase indemnifies for it, the allegation acknowledges.
25 That risk does not exist.

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1 The second risk that's talked about in 341 is a risk
2 of loss while staked because tokens can't be used for other
3 purposes like trading or transferring. Here, again, this is
4 just restating a condition imposed by the blockchain that the
5 validators who choose to sign up for this service and perform
6 this service for the blockchain, in return for a fee, put up
7 collateral while they're doing the service. Think of it
8 something like a security deposit. They're not going to do a
9 bad job. They're not going to make mistakes while they're
10 there. They get it back in the end. There's the allegation of
11 risk that they can't do other things with their collateral,
12 with their security deposit. Doesn't state a risk of financial
13 loss that *Rubera* was talking about in such a manner from your
14 investment.

15 The last two, again, I think your Honor summarized it
16 very well, 344 and 345 are just not staking risks, they're
17 risks alleged for anyone who holds tokens. Now, the way the
18 SEC frames that as a defensible and sufficient allegation is to
19 say that there's a risk of ownership loss for all token holders
20 and they don't have to allege more. And I want to tell you why
21 that's wrong, your Honor. But first, as you saw in the
22 briefing, we do take issue with and dispute that standard of
23 law.

24 What courts have to show is that investors put capital
25 into a business with the risk that its performance may lead to

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1 their inability to recover the capital. That's what investing
2 in such a manner to face the risk of loss is, according to
3 *Rubera*.

4 Stepping back, here the SEC is charging Coinbase with
5 offering an investment contract through its staking service.
6 To have an investment of money that's required for that, there
7 has to be a risk of loss alleged that arises from staking
8 through Coinbase. But even if that's not necessary and your
9 Honor says, Well, what about their risk of ownership loss? You
10 can see on the slide, as you jumped ahead to slide 21, there
11 are no well-pleaded facts here stating a risk of ownership loss
12 over staked tokens.

13 My friends at the front table say, That's our say-so.
14 It's the Court's say-so over and over again for a custodial
15 validator like Coinbase, ownership over staked assets is
16 dictated by the contractual agreement between the user and the
17 custodian. You can see in these provisions we've set out for
18 you, your Honor, this user agreement is crystal clear. Title
19 to staked assets at all times remain with the users. They do
20 not transfer to Coinbase, they don't become property of
21 Coinbase, and they don't become subject to general creditor's
22 claims under any circumstances. And these guarantees are
23 obviously very important that the tokens will be returned.

24 I want to point you to one more source, your Honor.
25 Your colleague, Judge Engelmayer, who recently confirmed this

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1 very point that I'm pressing to you as a basis for the
2 inadequacy of this claim. He examined whether title had passed
3 to Coinbase in any respect in the *Underwood* case. And he
4 granted the motion to dismiss based on the user agreement
5 finding, "The user agreement's terms flatly contradict the
6 allegations that Coinbase holds title to the digital assets."
7 Appendix 4 says the same thing for staking services; they do
8 not affect ownership.

9 Taking that on its face, your Honor, this is an
10 independent reason what why, as a matter of law, the complaint
11 fails to plead the required investment of money bearing a risk
12 of financial loss, and the claim should be dismissed. We think
13 that does resolve the staking claim.

14 THE COURT: You're saying it's an independent reason,
15 and that's because the first reason is because they aren't
16 securities?

17 MR. SCHWARTZ: Well, the first reason is there's no
18 investment of money in capital structure. And second, in any
19 case, there's no risk of financial loss well pleaded in the
20 allegations.

21 The last aspect of staking, I'm happy, your Honor, if
22 you'd like to discuss it. Although mindful of time, I'll
23 respect if you've heard enough about staking for the day. It
24 is the efforts of others that you've had some colloquy with our
25 friends from the front table as well.

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1 THE COURT: It seems that there's not necessarily a
2 disagreement between what activities or what services Coinbase
3 is or is not affording to folks involved in the staking
4 process, but whether those amount to ministerial or managerial.

5 MR. SCHWARTZ: For the most part, I think that's
6 right. I'll offer one clarification. You can see on slide 22
7 we tried to group the various activities from Coinbase that the
8 SEC alleges as efforts of others. The reason I offer an
9 asterisk to that otherwise apt description, your Honor, is the
10 first few categories do not concern Coinbase's activities or
11 those that are alleged to be managerial.

12 The first category, the group of paragraphs concern
13 general proof of stake activities; it's not about Coinbase, and
14 so that's not about Coinbase's efforts. The second is about
15 retaining third parties to stake assets. Again, not about
16 Coinbase, not Coinbase's efforts. The third category is about
17 liquidity pools for quicker withdrawal, something that's
18 acknowledged in the complaint is no longer the case in Coinbase
19 staking. But in any event, again, on its face, addresses the
20 administrative convenience of unstaking, of exiting the staking
21 program. It doesn't posit any managerial qualities or
22 otherwise in the conduct of the actual staking program at
23 issue.

24 So those first three I'll just say are actually
25 separate. The bottom two are the remaining efforts the SEC

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1 alleges. And quite as Honor put it, those just aren't the type
2 of managerial and entrepreneurial efforts required by *Howey*.
3 They are just the type of clerical and routine functions that
4 courts have found do not suffice to plead the requisite
5 standard of the material significant impact on returns. That
6 goes for the IT services with software and equipment. That
7 goes for the pooling, where there's an aggregation of tokens to
8 stake.

9 And we direct your Honor's attention to the *Life*
10 *Partners* case where what was found to ministerial, your Honor,
11 was an almost identical constellation of efforts that was found
12 to have "no material impact on the profits of the investors,"
13 including because these were services that "anyone, including
14 the supposed investor himself could supply these services,"
15 and there were a number of others who could have as well.

16 So again, happy to delve into it further, but we would
17 commend those excerpts that we've put in front of your Honor
18 from *Life Partners* to lay bare quite how clear it is as a
19 matter of law that we think the back office mechanical
20 outsourced IT services and administration that's alleged in
21 those bottom two categories of paragraphs do not rise to the
22 level of an adequate pleading of efforts of others.

23 THE COURT: Thank you so much.

24 I think that leaves me with Ms. Eddy and the major
25 questions doctrine. One of the discussions I was having with

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1 your colleague, Mr. Savitt, was the reconciliation, if there
2 needs to be one, between Coinbase's arguments about the
3 applicability or how it interpreters the *Howey* test and how
4 that works with the arguments it's making about the major
5 questions doctrine.

6 So perhaps we could begin there. Could you help me
7 reconcile those two ideas. And what I need in particular is,
8 to the extent that you are arguing that the *Howey* test applies
9 by its terms that that's the test I should be using and we
10 should be working in that framework, rather than suggesting
11 that these particular tokens are outside of that framework,
12 does that in any way exist in tension with your argument that
13 the SEC's bringing of this case amounts to some sort of
14 aggregation of powers it doesn't have?

15 And I'll ask you, just because I know this courtroom,
16 to grab the microphone and bring it near you. I'm sure we will
17 hear you, but I just know there's something about those
18 microphones. Thank you so much.

19 MS. EDDY: Thank you, your Honor.

20 And I will say I'll preface this by saying our
21 position is that our interpretation of *Howey* and our argument
22 about the investment contract and what it requires fortifies
23 the major questions position that we have, in fact, it
24 undergirds the whole thing.

25 We don't think you even get to major questions here

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1 because the text and the context and the precedent established
2 that the position the SEC is advancing here is not grounded in
3 law. But if the Court were to disagree and to find
4 plausibility in the SEC's position, that's when the major
5 questions doctrine would kick in and it would compel rejection
6 of that position. And that's because, as Mr. Savitt, I think,
7 already explained at length, the transactions on Coinbase's
8 secondary exchange are of a different character than anything
9 that the SEC has asserted regulatory authority over before, and
10 they are of a different character than the interpretation the
11 SEC itself has advanced in *Howey* in its briefing there.

12 It talked about contractual arrangements, for example.
13 It's different than any position that it's taken in briefing
14 since, in some of the briefs that Mr. Savitt highlighted from
15 *Edwards*. It's taking a different position than Chair Gensler
16 took in 2021 when he appeared before Congress asking for
17 regulatory authority to cover transactions on crypto exchanges.

18 THE COURT: Let me pause you right there for a moment
19 because I want to know the degree to which you're asking me to
20 look at certain allegations in the preface to your answer that,
21 again, to me seem to speak more to a question of optics or not.
22 For example, I can understand Coinbase's frustration that it
23 tried to be helpful, if that's how it perceives what it's
24 doing. It tried to be helpful, it tried to talk to the
25 commission, it tried to get some guidance. And then, rats,

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1 there's an enforcement action brought against it.

2 So I get that. But for me, there's a layer of optics
3 that I'm really not considering or at least I didn't think I'd
4 need to be considering in terms of the context of the major
5 questions doctrine, the fact that you asked for guidance, your
6 client asked for guidance and didn't get it. I'm assuming
7 instead I'm looking at a narrower universe of materials, which
8 would be the statements of SEC officials, of the higher-ups
9 there, and the positions that the commission itself has taken
10 in other cases. Am I correct or am I also supposed to be
11 looking at everybody's efforts to be helpful?

12 MS. EDDY: Your Honor, you're absolutely correct.
13 There is a good portion of the allegations in the preface to
14 our answer that you can properly consider and should consider,
15 not just as optics but as going to factors that the Supreme
16 Court has repeatedly identified as relevant, the bevy of
17 Congressional activity surrounding this very significant
18 question of how to regulate crypto, and the fact that Chair
19 Gensler made those statements to Congress in 2021, all those
20 facts you can consider and should consider, we submit.

21 And I don't think the SEC disputes that. Those aren't
22 really facts --

23 THE COURT: I don't think they dispute it. I think
24 what they say is the Gensler statement is taken out of context,
25 and you disagree. There's quite detailed and yet not the same

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1 results. I really think everybody has a view of that, and I
2 understand that.

3 With respect to the "bevy of Congressional activity,"
4 I thought I understood your argument to be — and it's also
5 presented in some of the amicus briefs — is that the fact that
6 Congress seeks greater clarity doesn't necessarily mean that
7 the SEC lacks the authority in this space. I appreciate that
8 your view is it does, but I think their argument is, We've
9 always had rights to regulate securities, and it may have took
10 us a moment. We may have stumbled along the way, but we
11 figured out how we could do it, and here we are doing it.

12 I'm not sure it's of a piece, for example, with — just
13 to pull something out of the air — with the OSHA vaccine
14 mandate — whatever your position is on that — I'm not sure that
15 was something OSHA did on a regular basis. Or the student debt
16 cancellation, I'm not sure that's done on a regular basis.

17 Here, the commission would argue, This is what we do.
18 And yes, the token, the asset may be different because over
19 time different assets develop, but it's really no different in
20 terms of the motive analysis that we're applying. Why are they
21 wrong? What is it about crypto that makes it so qualitatively
22 different than the other assets or the other putative
23 securities that the commission has considered and regulated
24 over time?

25 MS. EDDY: Let me begin by saying that it's not what

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1 makes crypto special. It's the nature of the transaction that
2 the SEC is now designating and calling a security that it
3 didn't designate or recognize as a security in any of its prior
4 briefing over sort of the 90-year history of the Exchange Act
5 in Chair Gensler's comments to Congress. And this is a special
6 kind of transaction; it's one that doesn't have an ongoing
7 legal relationship between the issuer and the purchaser.

8 So that is the class of transaction that is at issue
9 here. And the SEC is offering an interpretation through a
10 campaign of enforcement actions that is not just arrogating
11 authority to itself, it is expanding its jurisdictional
12 perimeter. In some sense it's similar to the *Brown &*
13 *Williamson* case where the question was was tobacco a drug or
14 device? Here, the question is is this class of transaction a
15 security? And the Congressional activity, we're not saying
16 that's dispositive, but it is something the Court can and
17 should consider under the governing precedents in assessing
18 whether Congress has spoken clearly about whether the term
19 "security," the term "investment contract" can properly be
20 conceived to cover what the SEC is identifying and pursuing
21 here. And I think, for all the reasons that Mr. Savitt already
22 gave, there's no clear statement of that kind here.

23 THE COURT: I just want to make sure I understand what
24 you're saying because it's not the answer I was expecting,
25 which doesn't mean it wasn't a perfectly fine answer. You're

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1 saying that the thing I should be concerned about is not crypto
2 assets, what are they, are they securities or are they not, but
3 that the particular transaction that's being challenged, the
4 particular types of transaction that are being challenged are
5 so different than anything as to which the commission's
6 asserted authority in its history? Am I understanding that
7 correctly?

8 MS. EDDY: That is the first part, your Honor, yes.

9 And I think the cases look both at what is the nature
10 of the arrogation of authority, how expansive is it? And I
11 think that's part one of the answer. The cases also look at
12 what is the impact here, and what is the significance on the
13 practical level of the expansion that the agency is asserting?
14 And that's where we look at the fact that this is an arrogation
15 of authority over an entire industry.

16 THE COURT: I'm sorry. I'm looking at the impact on
17 whom? On both the industry and on the commission? Because I
18 thought from listening to your colleagues at the front table
19 that one of the issues that was discussed was whether
20 enforcements went from something in the tens to something in
21 the thousands or something like that. So am I looking at what
22 this could do in terms of how much it would expand the number
23 of enforcement actions the commission could bring? Or am I
24 looking at it in terms of the crypto industry itself?

25 MS. EDDY: You're looking at it, your Honor, I think

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1 both, but it's certainly the latter. And the commission does
2 try to advance this argument that this is really just routine
3 enforcement action, and sort of incremental routine enforcement
4 action. It is certainly true that the complaint here pleads
5 allegations regarding just 12 tokens traded on Coinbase, but it
6 is part of a concerted campaign against crypto exchanges
7 generally.

8 There were other lawsuits filed in close proximity to
9 this one against other crypto exchanges, and it is obvious that
10 if the Court were to accept the commission's definition of
11 investment contract in this case, that would have essentially
12 legislative implications. It would affect the whole industry.
13 And the commission has kind of made no apologies for this.

14 THE COURT: Please pause for a second. Two followup
15 questions before you move to your next section of argument.
16 You're suggesting to me that I need to look at this as sort of
17 it's one enforcement action, it's only 12 to 13 tokens, but
18 heaven forfend, Failla, if you let this in, there will be
19 nothing but enforcement actions against either folks who
20 provide the services that Coinbase provides or crypto asset
21 issuers in the first instance.

22 So I guess when I'm thinking about the impact, am I
23 allowed to think of it, as you suggest, by looking at it not
24 merely as the case before me but as what that case might
25 portend?

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1 MS. EDDY: I think you are, your Honor. And I think
2 it is not just a matter of enforcement. I want to be clear
3 about that too. If the Court were to take the SEC's view that
4 the trades over Coinbase's secondary exchange are investment
5 contracts, then the implications of that are that the SEC's
6 regulatory apparatus applies to crypto, to crypto exchanges.
7 The Court can and should take that into account.

8 And I know there's been some suggestion that there's
9 an absence of authority for the proposition that an enforcement
10 action can give rise to the major questions doctrine, and I
11 want to just point the Court – one of the amici cites this –
12 but it's the *Gonzalez* case in which an enforcement policy was
13 at issue, and the major questions doctrine was applied there.
14 Attorney General Ashcroft had issued an interpretive rule
15 construing the Controlled Substances Act to prohibit
16 physician-assisted suicide. And the Court held that that
17 wasn't a regulation, it wasn't entitled to any deference of any
18 kind; it was an announcement of an enforcement policy, and it
19 applied the major questions doctrine to that.

20 And I think the doctrine applies when the position
21 that the agency is advancing is essentially an encroachment
22 upon Congress' prerogative. That is what's going on here.
23 Congress in 1934 listed out the instruments that qualify as
24 securities; investment contract is one of them. The SEC has
25 been litigating the contours of investment contract for

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1 decades, never advancing the theory it is now advancing in this
2 case. And that's precisely the sort of circumstance in which
3 the major questions doctrine should be invoked and should be
4 applied.

5 THE COURT: The second argument you make is that
6 accepting their position would have effectively legislative
7 implications. Did I understand that argument correctly?

8 MS. EDDY: Yes, I think that's right, your Honor.

9 The commission, deliberately seeing that Congress has
10 not acted, has not granted the authority to regulate crypto,
11 has instead taken matters into its own hands. It has gone back
12 and looked into the act from 1934 and said, Aha, we have the
13 authority we asked for two years ago. That's impermissible,
14 and it's impermissible because there's no clear statement that
15 this kind of transaction fits within the definition of a
16 security and, thus, within the commission's own jurisdiction.

17 THE COURT: I guess what concerns me is I'm reluctant
18 to focus or to view through too narrow a lens what the
19 commission's enforcement ability is. I think they're telling
20 me it is routine, and you're saying it's not, so I appreciate
21 that. I'm just saying that I guess another issue is ten years
22 on the bench, no one has ever said to me "major questions
23 doctrine" until this case. I understand ten years is just a
24 very small drop in the bucket to many judges, but I'm sort of
25 shocked. I've had some interesting cases, and this has never

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1 come up.

2 My research into this area does not suggest that it
3 comes up very often, and even less often does it actually get
4 found by a Court. So I guess my question, and I mean no
5 disrespect to your clients, but I'm just not sure the crypto
6 industry is so major or so extraordinary that I need to find it
7 here. I understand your initial point, which is you don't have
8 to if you just go our way on the other arguments, yes, I get
9 that. But I'm saying I have a natural hesitation to involve or
10 to make a finding that something implicates the major questions
11 doctrine because it is so infrequently done.

12 And I'm not sure this is on a par with the student
13 loan forgiveness or with the energy industry. And I know what
14 *Brown & Williamson*. Perhaps I might have my own skepticism
15 about the *Brown & Williamson* decision. I appreciate, of
16 course, that I'm bound by it. But I guess I'd like a little
17 bit of comfort that what you're asking me to do -- here's the
18 tension. You're saying to me what the commission is doing is
19 so crazy, so beyond what it should be doing that you need to
20 stop them.

21 My point to you is it is so infrequently, and, in
22 fact, this is the one case where I've been asked to do that,
23 that I worry that I am in my own lane doing exactly the thing
24 that you're arguing the commission is doing here, which is to
25 take power I don't have, to stop activity I shouldn't be

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1 stopping. I'm not asking you to hold my hand here, but I'm
2 just saying there's a comfort that I need to have that this
3 isn't as much of a nuclear option as I think it is based on the
4 cases that I've read.

5 MS. EDDY: Your Honor, you spoke about your own power
6 and the concern about stepping outside your lane, and I want to
7 just return to a comment that you made when speaking to my
8 colleagues on the front table about Senator Lummis' brief.

9 THE COURT: Yes.

10 MS. EDDY: The question here is, as between Congress
11 and the SEC, who has the power to legislate this question? And
12 that's, I think, the question that is central to your inquiry.
13 I do want to note, though, and just make sure the Court has in
14 mind there are a wide variety of circumstances in which the
15 major questions doctrine has been invoked and has been applied.

16 THE COURT: Yes, those are two different things, being
17 invoked and being applied.

18 MS. EDDY: Well, let's talk about the ones in which
19 it's been applied. It's been applied to the elimination of
20 rate publication requirements for 40 percent of telecom
21 providers in the long distance business. That's the *MCI* case.
22 It's been applied for new emissions controls for existing coal
23 mines. That's *West Virginia*. The eviction moratorium at issue
24 in the *Alabama Association of Realtors* case was one affecting 6
25 to 17 million tenants with a potential economic impact of

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1 50 billion.

2 And let me just pause on that for a moment because
3 there's been some math thrown around. This is not a math
4 question. And none of the cases treat this as a math question
5 or as a question of fixed numbers. It gives a flavor of the
6 significance of the impact of the agency's action. Chair
7 Gensler himself the very day he made the request of congress
8 for authority to assert regulatory authority over crypto
9 exchanges prefaced his comments by saying this is a
10 2 trillion-dollar industry.

11 The SEC's complaint, I think paragraph 1 talks about
12 billions of dollars in trades happening every day. The
13 economic impact here could be really crippling, and I want to
14 just make a point that hasn't gotten a lot of play here today
15 yet, which is the architecture that the SEC has in place it
16 does not work with crypto. That's why my clients made a pitch
17 for rule making. There's no pathway to registration as it
18 stands right now. So if the SEC's position is accepted, the
19 potential impact of that is potentially crippling.

20 THE COURT: Is it crippling or are you going to tell
21 me it's existential? Or is it existential for those assets as
22 to which transactions in the assets, however they come about,
23 are investment contracts?

24 MS. EDDY: I think it is certainly the impact is vast,
25 your Honor. And I will return again to the point that the SEC

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1 is offering no limiting principle really to what it will
2 designate as an investment contract in the absence of an
3 ongoing contractual obligation or something that's conferring a
4 share in the enterprise. So the potential impact is vast.

5 Now, it could go, I suppose, a different way. The SEC
6 could put in place an entire new architecture that would
7 address this. That's the kind of change, though, that the
8 major questions doctrine says should not be effectuated by the
9 agency. That's something that Congress should decide. Those
10 are the kinds of questions that Congress has before it now, and
11 that Congress should have been left to decide before the SEC
12 came and took matters in its own hands.

13 THE COURT: But in fairness, they haven't done
14 anything. So I have a concern about not recognizing someone's
15 authority to do something in this space. The answer may be
16 that I'm just out of luck until Congress acts, as you would
17 say, Chair Gensler recognized sometime ago. But maybe I'll
18 leave it at that. Okay. Thank you.

19 Did I just deprive you of some great thought you
20 wanted me to know about?

21 MS. EDDY: I don't believe so, your Honor, but I'm
22 sure there will be an opportunity later if something comes to
23 mind that I think I missed.

24 THE COURT: Funny you should mention that. We've now
25 finished our fourth hour of argument and congratulate those of

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1 you who've stayed and listened through all of this. I have
2 asked the 14 pages of questions I wanted to ask, and I thank
3 you very much. And what I'd like to do is the following: I
4 imagine that if I asked you, you would not forego the
5 opportunity to say something to me in the vein of a summation
6 or something I need to focus on or something I was too dumb to
7 ask you about.

8 So we're going to take another break, and I'm going to
9 ask folks to get together. Mr. Peikin, my thought was that's
10 where you would be coming in and you would be speaking to that
11 issue, but if there's something else, tell me now because you
12 were designated cleanup. So what is it that they --

13 MR. PEIKEN: I was responsible for correcting errors,
14 and since none were made, there's nothing for me to contribute,
15 your Honor.

16 THE COURT: I do appreciate the love the back table
17 has for each other. I still think you should make a play to
18 speak, but that's just me.

19 MR. PEIKEN: This is the longest I've been silent for
20 my entire life.

21 THE COURT: I'm not going to disagree. Yes. So take
22 ten minutes, think small thoughts, just something really
23 summary that you want me to know that I'm not going to get from
24 our argument, which I promise you I will reread the transcript
25 of and from the briefing. And just in case there's something

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1 we didn't cover and we should have, that's your opportunity.
2 Let's say five, ten minutes maximum. This is not the two-hour
3 summation at a trial. But take the break, thank you all very,
4 very much for your preparation. And my thanks to those of you
5 who've spoken today, to those of you on quality control, to
6 those of you who actually prepared the oralists to speak as
7 well as they did. You have my deepest thanks because this is a
8 hard question, but I can't say there's an argument you haven't
9 made to me. I just have to decide which one makes more sense.
10 So we'll be back in ten. I thank you very much.

11 (Recess)

12 THE COURT: Mr. Costello, whom do I have the pleasure
13 of hearing from from your side? Unless you want to forego all
14 of this.

15 MR. COSTELLO: Your Honor will be hearing from
16 Mr. Tenreiro.

17 MS. TENREIRO: Thank you, your Honor.

18 And I am going to use some of the five to ten minutes
19 you've given me to clarify something that I think is critical
20 to the Court's decision today. There's been a lot of talk
21 about *Ripple*, *Terraform*, and *LBRY*, and I know the Court's going
22 to look at, again, the cases and at the briefs.

23 So in one respect, we absolutely agree with the Court
24 that this case is different. And the reason it's different is
25 because in this case, we sued the intermediary. So the cause

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1 of action was here, Section 5 under the '34 Act. In those
2 cases, all of them involved at a minimum causes of action under
3 Section 5 of the '33 Act. But what those cases did involve,
4 and I think there's been a perhaps accidental misstatement,
5 particularly of *Terraform*, is sales by those issuers on what
6 we're calling today secondary market platforms, and to read
7 from Judge Rakoff's summary judgment ruling – and that's
8 page 60, I think of the Westlaw version at least – and it's in
9 a section where he says that *Terraform* violated Section 5.
10 *Terraform* also sold both LUNA and MIR tokens to secondary
11 market purchasers on...crypto trading exchanges.

12 So our contention is, if he's correct that those were
13 securities, and those crypto trading exchanges meet the
14 statutory definition of exchanges, those exchanges are
15 violating, like Coinbase, Section 5 of the '34 Act, while
16 *Terraform* is violating Section 5 of the '33 Act.

17 Neither *Ripple* nor *Terraform* nor *LBRY* involved any
18 claim by the commission that a sale between what I'll say two
19 of us here at this table was a violation of the act. All of
20 those cases focused entirely on the issuer's conduct, but all
21 of those cases, *Ripple* included, and *LBRY*, all of them, they
22 sold also on these platforms, right? And Judge Barbadoro found
23 no meaningful distinction, neither did Judge Rakoff in
24 *Terraform* find a meaningful distinction between an issuer
25 selling on the platform and what Judge Torres calls blind bid

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1 asset transactions or selling them more or less directly
2 through these one-on-one meetings.

3 And the reason that matters to us, your Honor, is the
4 cases are different in the cause of action. Our perspective is
5 they're identical in terms of the *Howey* test that applies. And
6 we think Coinbase is trying to create a different *Howey* test
7 for when the people at this table might sell the tokens to each
8 other on its platform and when *Terraform* might sell its tokens
9 on Coinbase's platform. And we think that's just wrong, your
10 Honor.

11 And actually, Coinbase did the Court a favor and put
12 some of our briefs there. And if the Court does in its spare
13 time look at the briefs, our briefs and defendant's briefs,
14 they're actually remarkably quite similar. A lot of them talk
15 about these contractual obligations, and so our perspective is
16 it's the same test. The fact that it's an issuer selling it on
17 the platform or that two people are reselling it once it sells
18 does not materially alter the outcome.

19 And why does this even matter for this case is that
20 there's a lot of conversation about the asset hub, but the key
21 sentence in paragraph 65 of our complaint, your Honor, is
22 actually the last one, which Coinbase, I believe, admits or at
23 least qualifies. And what we say there is that Coinbase does
24 not restrict issuers from selling its tokens on these
25 platforms, and they admit that Coinbase permits them, subject

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1 to certain restrictions, to create customer accounts and engage
2 in secondary market transactions.

3 So if Judge Rakoff is correct, then that's the end of
4 this motion to dismiss, given that admission in paragraph 65.
5 Now, to be fair, to be clear, we focused on sort of Solana and
6 these tokens because, again, we don't view a distinction
7 between the issuer selling or what Coinbase calls engaging in
8 secondary markets transactions on the Coinbase platform.
9 That's a reference to the exchange, not the asset hub, and
10 again, people at this table selling amongst themselves. So
11 that's the clarifying point.

12 I'll now move to a brief summation, with the Court's
13 indulgence. So the parties agree, I think, your Honor, that
14 this case is resolved by the statute, and really it's not a
15 major questions case. There's some modicum of agreement.
16 Where we part ways with Coinbase, at least for purposes of this
17 summation, is as to what *Howey* requires. We think they're
18 making up a new test, and we believe that our position is the
19 one that's most faithful and consistent, but, in fact,
20 compelled by the *Howey* test. It's not just a plausible
21 reading, as they claim it is.

22 And one phrase I would like to leave the Court with
23 that was not discussed a lot today that I would like to have in
24 the Court's mind before we leave is "economic reality."
25 Economic reality is part of the analysis that Mr. Costello was

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1 offering earlier and that I believe is completely avoided by
2 Coinbase's arguments, and that provides part of the limiting
3 principle, including the Court's concern about a floodgate of
4 private actions.

5 And so I'd like to borrow from a rhetorical question
6 that the chief justice asked in the *Biden v. Nebraska* case.
7 Wouldn't the Congress be surprised that the commission is
8 bringing this action? We know they created the commission. We
9 know they said to securities exchanges, You got to register.
10 We know they gave the commission the power to sue if someone
11 violated this command.

12 So the answer to whether they would be surprised --
13 and Coinbase we know does not dispute for purposes of this
14 motion that they are an exchange. The answer to the question
15 depends on what are they exchanging? Coinbase and the amici
16 suggest that we're suing the supermarket, that we've sued Whole
17 Foods. And I concede that if we had sued Whole Foods, we
18 should lose. But economic reality makes it quite plain that
19 our lawsuit and these transactions and these assets are of a
20 quite different nature than if I were suing someone for
21 intermediary transactions in bananas or other items that they
22 used in their examples.

23 What is at issue here -- and let's just imagine this in
24 the eyes of the Congress of 1934. It's an exchange. That's
25 conceded for purposes of this motion. The exchange permits

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1 buyers and sellers, they get together and they trade in these
2 assets. What are these assets as a matter of economic reality?
3 There are issuers also in this marketplace. And in 1934
4 there's no crypto, so what they have maybe is just a piece of
5 paper with numbers to keep track. That's all that is, and that
6 doesn't do anything.

7 It represents what these investors are buying, and the
8 issuers say, Give us all your capital, give us your capital.
9 We're going to take this capital, and with this capital we're
10 going to make these little pieces of papers with numbers
11 valuable, and you'll be able to resell them, and you'll make
12 some money. And the exchange – again, they concede an
13 exchange – also permits people to buy and sell amongst
14 themselves these same little pieces of paper. And everybody
15 knows because these issuers in 1934 have flooded all the
16 then-available methods of communication. They've bought radio
17 ads and put in the paper and sent glossy mailers and said, This
18 is what we're going to do.

19 Because I have to explain to you what these little
20 pieces of paper do. They're not bananas. Let me explain to
21 you what's going to happen with them. After I take your funds
22 and deploy those funds into this ecosystem, you're going to
23 make some money. And the other thing the issuers remind
24 everyone of consistently is, I'm going to keep a big stash to
25 myself because when they go up in value, I'm going to make

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1 money too.

2 So the reasonable investor in 1934 understands that
3 what they're buying into is an investment contract. Wouldn't
4 the Congress of 1934 be surprised that we've asked that this
5 exchange register? I submit to the Court that the answer is
6 plainly no. If the response were, Well, yes, you're right,
7 SEC, but the issuers were clever enough – and not to use a
8 magical word like impressions of an offer of contractual
9 obligation or were clever enough to not reduce into writing the
10 promises that they've made, therefore, this is Whole Foods, I
11 submit to the Court that the Congress of 1934 would not only be
12 surprised, but actually stunned that there would be such an
13 easy workaround to the carefully constructed regulatory
14 structure that they created in 1933 and 1934 around the capital
15 markets.

16 So we are asking that the Court not endorse such an
17 outcome, your Honor. We are simply asking that the Court look
18 at the economic reality, apply the *Howey* test as it was
19 written. And to end on a major questions point, we believe
20 that the *Howey* test is there, precisely as I said, to give
21 effect to that Congressional purpose. And to set it aside or
22 add elements to it, as Coinbase is really asking the Court to
23 do, is really what creates violence to the statutory structure.
24 For those reasons, your Honor, we ask that Coinbase's motion be
25 denied in its entirety. Thank you.

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1 THE COURT: Thank you very much. Just one moment,
2 please. Thank you.

3 Someone at the back table?

4 MR. SAVITT: Your Honor, good afternoon. I think I've
5 been designated.

6 THE COURT: Congratulations.

7 MR. SAVITT: Thank you so much. And let me say we're
8 thankful for Court's time and patience with our arguments.

9 THE COURT: You've helped me more than I've helped you
10 in any way. Thank you.

11 MR. SAVITT: Thank you, your Honor.

12 Let me start here. I think, after all of it, after
13 our four and a half hours, and after hearing from our friends
14 at the table in front, the SEC still has not alleged and
15 doesn't contest, doesn't argue that the issuer of any of the 12
16 tokens that it challenges in this complaint made any statement
17 that could be interpreted as a contractual obligation. Still
18 less, any kind of promise or obligation that traveled with any
19 of the 12 tokens at issue when they were sold in blind
20 transactions on the secondary market.

21 We heard a little more about paragraph 65 of the
22 complaint, and I don't want there to be any confusion on that.
23 That platform allows that promoters, like everyone else, can
24 make trades on the platform of tokens that have already been
25 issued. It does not involve primary transactions, it is purely

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1 secondary transactions. That's what paragraph 65's last
2 sentence is about.

3 And for the reasons we've talked about, nothing in the
4 allegation of this complaint gives rise to any allegation
5 regarding any primary transaction or initial coin offering.
6 And the fact that there are no promises of any kind that travel
7 in any of these transactions, we think is fatal to the
8 complaint.

9 I want to talk just a bit more about *Howey* because
10 it's an important case, and I don't know if it's the alpha and
11 the omega. I don't know if it's the beginning and the end, but
12 I don't want there to be any mistake about it. *Howey* is where
13 we start. And the promoter, they're talking about economic
14 reality. The promoter there was a company. It sold parcels of
15 land and a commitment to do stuff on that land, two contracts.
16 The question before the Court was whether those two contracts
17 can be stapled together. If the answer was yes, there would be
18 an investment contract. If the answer was no, there wouldn't
19 be, an asset plus an obligation. That is what all the blue sky
20 laws said an investment contract was. That's what *Howey* said
21 it was.

22 Now the commission has argued in its papers – we
23 didn't get a chance to talk about this when we were talking
24 earlier – that *Howey*'s obligation to develop the orange
25 business was what it called purely incidental. It does this,

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1 the commission does, by plucking those words that are purely
2 incidental and are obviously out of context in *Howey* itself.
3 The sale of the land, the asset sale was what the Court called
4 purely incidental. The management contract, the contractual
5 obligation to develop the business, that was the opposite of
6 incidental. It's what made the arrangement a security.

7 There's no way to read that opinion and not understand
8 it. You can even read Justice Frankfurter's very short and
9 completely overlooked dissent, and it will tell you the same
10 thing. There's no doubt that what made the two contracts there
11 an investment contract was that the asset was stapled to an
12 obligation to manage.

13 The cases, one after another after another, teach the
14 same lesson. I won't rehearse them all. I will also refrain
15 from undue counterfactual historiography as to what the
16 Congressmen and women in 1933 and 1934 would have thought about
17 this. But I will tell you this, I think there would have been
18 a lot of surprise to find out that an investment contract
19 didn't have anything to do with a contract at all. And that's
20 the position that's being sponsored here, that the very words
21 of that statute are being alighted from, erased from it,
22 completely in derogation of all the case law that preceded it
23 and all that has followed. I would also say I think it will
24 come as a surprise to Senator Lummis, that this was obviously
25 something that was to be regulated.

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1 I won't cause the Court to look at it, but slide 12
2 recounts about -- I don't know -- maybe a dozen and a half
3 statutory initiatives over the past two years where Congress is
4 trying to figure out who crypto should be regulated by and how.
5 I think there would be an awful lot of surprise, historical and
6 present, about the willy-nilly arrogations of regulatory
7 authority that the SEC purports to assert by virtue of this
8 action.

9 Part of the trouble with the position the commission
10 here sponsors is that we wish to insist that there has been no
11 showing of a necessary limiting principle. We talked about
12 this a little bit, your Honor. I want to push on it because it
13 won't do to say an asset plus promotional statements is enough,
14 and it won't solve that problem to say, Well, you're buying
15 into an ecosystem. I am advised that there is an Apple+
16 documentary about Beanie Babies that talks at great length
17 about the --

18 THE COURT: Please don't make me watch it.

19 MR. SAVITT: Your Honor, I thought about it.

20 That makes perfectly clear the communities that grew
21 up around that. And it is true of all sorts of things that
22 people buy and sell, the buying into a community. It is an
23 absolutely vacant limiting principle. It's no limiting
24 principle at all.

25 The point is further illustrated by the

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1 acknowledgment, the concession that Bitcoin is a commodity, not
2 a security. Bitcoin has every bit the ecosystem of these other
3 tokens. There are community groups, there are chat groups,
4 there are validators, there are support groups. Bitcoin is an
5 ecosystem just like all of the others, and that won't do as a
6 limiting principle, as the commission's own actions we think
7 make clear.

8 On the other branch of our argument, whether the
9 investment needs to be in an enterprise, I just want to make
10 sure to call to the Court's attention what *Howey* said. Because
11 *Howey* didn't use the idea that the investment contract had to
12 be what it called shares in an enterprise. That's from the
13 Supreme Court 3218 U.S. at 299. That's *Howey*. And it's not
14 for nothing that Judge Bodine talked about finding and
15 discussing investment contracts, that what was purchased in
16 this case was not a share of a business enterprise, and so not
17 a security.

18 These cases haven't addressed this issue because this
19 issue is new, but they address the principle at issue here,
20 which is when does an investment in an asset become an
21 investment in an enterprise. And the answer is clear in case
22 after case, it is at the moment where the asset is stapled to a
23 contractual undertaking that gives an interest in the
24 enterprise.

25 Let me close with just a word or two more on secondary

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1 markets, because I think the following can be fairly said. The
2 commission's complaint draws the Court into truly unprecedented
3 territory. To call these secondary market transactions
4 "investment contracts" when there's no contract is atextual and
5 it's ahistorical and it's unprecedented. There has been no
6 finding of any kind in any court that a transaction on a
7 secondary market gives rise to an investment contract, and that
8 is not a coincidence.

9 Echoing the conversation, your Honor, that you and I
10 had a little bit ago, investment contracts are contracts, after
11 all, and that implies privity. And absent the usual
12 circumstances, circumstances that one can imagine, but
13 nevertheless aren't alleged here, contractual obligations could
14 travel so as to create an investment contract, no allegation
15 here. And what we say you can't have, what we say will make a
16 hash of the statute is an investment contract without at least
17 the appearance of an offering, and that is completely not
18 alleged in this case, and there was a reference --

19 THE COURT: May I hear that again, please. You cannot
20 have an investment contract without at least the appearance of
21 an offering?

22 MR. SAVITT: You cannot have an investment contract
23 without at least the appearance of an offering or instrument
24 that carries with it the contractual obligation.

25 THE COURT: Thank you.

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1 Just while we're talking, what do you mean by "at
2 least the appearance of"? It's this strange simulacrum that
3 you're suggesting. I guess you're just trying to cover all
4 bases. It's the word "appearance" that's throwing me off.

5 MR. SAVITT: What we're trying to convey here, your
6 Honor, is that an attitude towards this instrument is not
7 ungenerous, but generous towards the commission. If there is
8 an instrument that is meant to convey a contractual obligation,
9 that is, an offering of an instrument that is meant to convey,
10 that will satisfy the securities laws. But it has to partake
11 in the appearance or offering or intent to create a contractual
12 obligation. Otherwise, you do not have an investment contract;
13 you just have an investment. So it's got to be stapled to
14 something that from an objective standard could constitute the
15 offering of a contract in the mind of a reasonable offer or an
16 offeree.

17 I wanted to very quickly just mention the DAO Report
18 because it came up earlier, and it bears a little bit on this
19 because it's the kind of instrument that one could imagine
20 fulfilling some of the characteristics that aren't fulfilled in
21 the pleadings. But what I wouldn't want left is the impression
22 that the DAO Report put anyone on notice of what is going on
23 here.

24 Here's what the DAO Report said. The DAO token was
25 like, and I'm quoting now from the SEC, "The token was like

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1 buying shares in a company and getting dividends because block
2 token holders could vote to distribute the DAO's anticipated
3 earnings from the projects it funded." That was the
4 commission's conception in 2017.

5 Notice its language. It has all the earmarks, not
6 just of what we're saying today – of course we're litigants,
7 we're going to be skeptical, we have a position. It has all
8 the hallmarks of all the cases we've been seeing for a hundred
9 years. 2017, you had an instrument that was buying shares that
10 had the possibility of getting dividends that had voting rights
11 and, therefore, had an interest in the enterprise in a manner
12 that at least resembled other securities. That's what the DAO
13 Report was about. They're 180 degrees away from that point
14 now. In fact, no court has ever held that something without
15 those sorts of attributes can be traded on a secondary platform
16 and be a security.

17 By the way, I want to say this and then I'll stop.
18 Coinbase appreciates the utility and the wisdom of sound and
19 predictable regulation in the crypto industry, as in elsewhere.
20 The Court should know that Coinbase is subject to many, many
21 regulatory regimes, state regulatory regimes, the CFTC. It's
22 not as though there's no regulatory authority beyond the SEC.

23 Coinbase has made clear in this case in its public
24 statements about the SEC that it's looking for rules of the
25 road, and we know the SEC has a broad mandate to regulate

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1 things that are securities. But the SEC's regulatory reach
2 does not go beyond securities. And if it's permitted to
3 regulate here, it's permitted to regulate everywhere. And it
4 could do so after the fact, enforcement actions, with or
5 without notice, with or without warning. And that is not the
6 way administrative law is supposed to work.

7 The SEC knows, your Honor, that it's trying to squeeze
8 crypto transactions into a statutory rubric where they don't
9 belong. That's the significance of the Chair Gensler remarks.
10 That's the significance of DAO. There's an understanding that
11 they don't fit. We know Congress is trying to sort it out.

12 And what should happen here is the SEC should follow
13 enforcement and rule making actions that make sense of the
14 statutory language that does not twist it upside down, that
15 does not read the word contract out of the word contract, that
16 harmonizes rather than does violence to all of the cases that
17 have come before it. And this is several bridges too far, and
18 for that reason we really encourage the Court to grant the
19 motion.

20 THE COURT: Earlier today my deputy said to me with
21 some horror, "Are you going to decide this from the bench?"
22 And it only prompted horror on my part. I had questions when I
23 began this day. I have some answers, and I have some questions
24 as I end the day. So I suppose I should thank you both. And
25 it is a measure of everyone's preparation that I can't decide

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1 this from the bench right now, so take that as the compliment
2 it is.

3 I have a favor to ask of the folks at the back table,
4 and that is if you would accept a friendly amendment of your
5 transcript order to be tomorrow rather than this evening, but
6 I'm aware that the court reporters have been moved to other
7 places this afternoon, and I kept them so much longer than they
8 thought that I just ask for your indulgence. Again, since I'm
9 not deciding today and with appropriate respect to your client,
10 tomorrow should be fine for everybody. So I'm going to ask
11 that your request for whatever is nightly becomes daily. I
12 never know what the thing is, so let's hope for tomorrow.
13 You'll be fine. Nothing will change between tonight and
14 tomorrow. All right.

15 I think we've all had a really productive day. I
16 appreciate it very much. Speaking only for myself, I'd like
17 some lunch. Hopefully you will too. Thank you. That's all I
18 can say. Thank you very much, and we'll talk again when we
19 can.

20 We're adjourned.

21 (Adjourned)